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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

D.C. TRANSIT SYSTEM, INC.

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 13, 1988

Questions Presented

1. Whether depriving a public utility of its property by retroactive invalidation of unchallenged rate increases violates established precedents of this Court and due process principles?

2. Whether depriving a public utility of the increase in the value of non-depreciable property violates established precedents of this Court and due process principles?

3. Whether depriving a public utility of the market value of its property at the moment the property is first devoted to public service violates established precedents of this Court and due process principles?

RULE 28.1 LISTING

The following are parents, subsidiaries (except wholly owned subsidiaries) or affiliates of petitioner D.C. Transit System, Inc.:

D.C. Trading and Development Corp.

D.C. Realty and Development Corp.

DCTECH Research Centers, Inc.

Trans Carib Air, Inc.

RULE 21.1(B) LIST OF PARTIES

The petitioner is D.C. Transit System, Inc. The respondents are:

Washington Metropolitan Area Transit Commission

Democratic Central Committee of the District of Columbia

Leonard N. Bebchick

Black United Front

Washington Area Construction Industry Task Force

District of Columbia

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Petitioner,

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WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner D.C. Transit System, Inc. ("Transit") respectfully prays that a writ of certiorari issue to review the judgment and mandate of the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") entered in this proceeding on September 14, 1988.

Opinions Below

The report of the Washington Metropolitan Area Transit Commission (the "Commission") Hearing Officer is unreported and appears in the Appendix at A1-A133. The decision of the Commission substantially adopting the Hearing Officer's Report is also unreported and appears in the Appendix at A134-A180. The opinion of the Court of Appeals is reported at 842 F.2d 402 (D.C. Cir. 1988) and appears in the Appendix at A181-A252. The orders of the Court of Appeals denying Transit's petition for rehearing and suggestion for rehearing *en banc* are unreported and appear in the Appendix at A486-A487.

Jurisdiction

The judgment and mandate of the Court of Appeals was entered on September 14, 1988. This petition for certiorari is filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions, Statutes and Code Provisions Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> nor [shall any person] be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Franchise Act, Pub. L. No. 84-757, § 4, 70 Stat. 598 (1956) provides:

> It is hereby declared as a matter of legislative policy that in order to assure the Washington Metropolitan Area of an adequate transportation system operating as a private enterprise, the Corporation, should be afforded the opportunity of earning such return as to make the Corporation an attractive investment to private investors.
>
> * * *
>
> It is further declared as a matter of legislative policy that if the Corporation does provide the Washington Metropolitan Area with a good public transportation system, with reasonable rates, the Congress will maintain a continuing interest in the welfare of the Corporation and its investors.

Section 5 of the Franchise Act provides in relevant part:

> The initial schedule of rates . . . shall continue in effect until August 15, 1957, and thereafter until superseded . . . . Whenever on or after August 15, 1957, the Corporation files with the Commission a new schedule of rates, such new schedule shall become effective on the tenth day after the date of such filing, unless . . . the Commission suspends the operation of such new schedule . . . . If the Commission suspends such new schedule it shall immediately give notice of a hearing . . . and, after such hearing . . . shall determine and by order fix the schedule of rates to be charged by the Corporation. If the Commission does not enter an order, to take effect at or prior to the end of the period of suspension . . . the suspended schedule filed by the Corporation may be put into effect by the end of such period, and shall remain in effect until the Commission has issued an appropriate order based on such proceeding.

70 Stat. at 599.

The Washington Metropolitan Area Transit Regulation Compact, tit. II, art. XII, § 6(a)(4), incorporated into Pub. L. No. 86-794, 74 Stat. 1031 (1960) provides in relevant part:

> It is hereby declared as a matter of legislative policy that in order to assure the Metropolitan District of an adequate transportation system operating as private enterprises the carriers therein, in accordance with standards and rules prescribed by the Commission, should be afforded the opportunity of earning such return as to make the carriers attractive investments to private investors. As an incident thereto, the opportunity to earn a return of a least 6½ per centum net after

> all taxes properly chargeable to transportation operations, including but not limited to income taxes, on gross operating revenues, shall not be considered unreasonable.

74 Stat. at 1040-41.

D.C. Code § 43-702 (1967) (codified in 1981 as §§ 43-901 and 43-902) provided in relevant part:

> All public utilities to which an order of the Commission applies shall make such changes in their schedules on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any public utility in any such rates, tolls, or charges, or in any joint rate or rates, without the approval of the Commission. Certified copies of all other orders of the Commission shall be delivered to the public utility affected thereby in like manner, and the same shall take effect within such reasonable time thereafter as the Commission shall prescribe.
>
> * * *
>
> The Commission may, at any time, upon notice to the public utility and after opportunity to be heard . . . rescind, alter, or amend any order fixing any rate or rates, tolls, charges, or schedules, or any other order made by the Commission, and certified copies of the same shall be served and take effect as herein provided for original orders.

D.C. Code § 43-703 (1967) (codified in 1981 as § 43-903) provided in relevant part:

> All rates, tolls, charges, time and condition of payment thereof, schedules, and joint rates fixed by the commission shall be in force and shall be prima facie reasonable until finally found otherwise in an action brought for that purpose.

D.C. Code § 12-301 (1981) provides in relevant part:

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues. . . .
>
> (8) for which a limitation is not otherwise specifically prescribed—three years. . . .

Statement of the Case

In 1956, Congress granted Transit an exclusive 20-year franchise to provide a mass transportation system in the District of Columbia and its environs conditioned upon Transit acquiring the assets of Capital Transit Company ("Capital") which had served the area's mass transportation needs for many years.[1] Accordingly, at 11:55 p.m. on August 14, 1956, Transit acquired all of Capital's assets and at 11:59 p.m. on August 14, 1956, Transit commenced operating the system. The assets had a net book value on Capital's books of approximately $23,880,000. Transit paid $13,540,000 for all of Capital's assets and assumed Capital's financial obligations. At the time Transit obtained its franchise, the Franchise Act and subsequently the Washington Metropolitan Area Transit Regulation Compact (the "Compact"), under which Transit subsequently operated, specifically provided that investors in Transit, having taken a risk of loss, were entitled to recover a reasonable return on their investment.[2]

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[1] Franchise Act, Pub. L. No. 84-757, § 2, 70 Stat. 598 (1956). The term of the franchise was abbreviated in 1973 when Congress transferred the responsibility to a public authority. National Area Transit Act of 1972, Pub. L. No. 92-517, 86 Stat. 999 (1972).

[2] *Washington Metropolitan Area Transit Regulation Compact*, tit. II, Art. XII, § 6(a)(4), *incorporated into* Pub. L. No. 86-794, 74 Stat. 1031 (1960); Franchise Act, Pub. L. No. 84-757, § 4, 70 Stat. 598 (1956).

Prior to January 26, 1968, basic rates for mass transportation in the District of Columbia had been set at a cash fare of twenty-five cents and a token fare of four for ninety-eight cents. On January 26, 1968, the Commission issued Order No. 773 and granted Transit a fare increase to make up a deficiency in the revenues necessary to insure Transit's investors a reasonable rate of return.[3] Between January 26, 1986 and June 26, 1970, the Commission issued at least four additional and independent orders granting similar fare increases to Transit: Order Nos. 882[4], 900[5], 984[6] and 1052[7]. While farepayer challenges were brought against Order Nos. 773 and 1052, no farepayer challenges were *ever* brought against intervening rate Order Nos. 882, 900 and 984.

In *Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786, 789-90 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974) (hereinafter *"DCC-I"*) and *Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, 485 F.2d 886 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974) (hereinafter *"DCC-II"*), the Court of Appeals reviewed Order Nos. 773 and 1052, invalidated the fare increases and held that Transit's riders were entitled to restitution for fare overcharges.[8] Specifically, the Court of Appeals found that Order Nos. 773 and 1052 were defective because the Commission had not considered the extent to which appreciation in the value

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[3] 72 P.U.R.3d 113, 158 (WMATC 1968) (A253-A331).

[4] On October 29, 1968, the Commission issued Order No. 882. The order is unreported but is included in the Appendix at A332-A349.

[5] On December 23, 1968, the Commission issued Order No. 900. The order is unreported but is included in the Appendix at A350-A364.

[6] 81 P.U.R.3d 417 (WMATC 1969) (A365-A433).

[7] 85 P.U.R.3d 1 (WMATC 1970) (A434-A485).

[8] *DCC-II*,485 F.2d at 915; *DCC-I*, 485 F.2d at 829.

of Transit's properties (both depreciable and non-depreciable) might have obviated the need to generate additional revenue through fare increases.[9] The Court of Appeals held that Transit's farepayers were entitled to restitution of the appreciation in value of in-service properties subsequently converted to non-operating status.[10] The Court of Appeals remanded the fare order challenges to the Commission for determination of the amounts, if any, of appreciation in the value of Transit's properties and for computation of any restitution award resulting therefrom.[11] The issues raised in this petition arise out of disputes between the parties over the use by the Commission of calculation methods which violate prior decisions of this Court and fundamental due process principles.

In the remand proceedings concerning Order No. 773, Transit argued that any farepayer recovery from the net gain on properties was limited to the amount of the increased fares collected under Order No. 773 during the 277 days it was in effect. In rejecting Transit's argument, the Commission found that "Order No. 773 was the base fare" and "foundation" for all future rate or-

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[9] *DCC-II*, 485 F.2d at 898-902; *DCC-I*, 485 F.2d at 822.

[10] *DCC-II*, 485 F.2d at 913-914; *DCC-I*, 485 F.2d at 822, 827. As the Court of Appeals recognized, the rationale of these decisions was that any gain in the value of an in-service property should have inured to the farepayers' benefit on the date that property was removed from operation. A189. *DCC-II*, 485 F.2d at 898-902; *DCC-I*, 485 F.2d at 822.

[11] In *DCC-II*, the Court of Appeals also concluded that the Commission did not discharge its duty to consider efficiency and viability when issuing a new fare through Order No. 1052. 485 F.2d at 913. The Court of Appeals directed the Commission to examine whether Transit was efficiently managed and viable in 1970. Upon remand, the Commission concluded that at the time of the 1970 fare elevation, Transit was efficiently managed and viable. A186. The Court of Appeals affirmed the Commission's findings. A185-A188. No issue is raised in this petition concerning the efficiency and viability issues.

ders and that Order Nos. 882, 984 and 1052 were merely "incremental" to Order 773. A159. Accordingly, the Commission measured the limits of restitution by "the annual level of revenue increase authorized in Order No. 773 multiplied by the number of years that Transit continued utility operations" under subsequent orders. A158.

On remand, the Commission measured the appreciation in value by comparing the *book value* of the property on the date the property was first devoted to operating service with the property's market value on the date the property was removed from operating service. Hence, the Commission used a "book-to-market"[12] approach rather than the "market-to-market"[13] approach urged by Transit. Transit took exception to the "book-to-market" approach and contended that appreciation should have been calculated by subtracting the *market value* of the property when devoted to public service from the market value when the property was removed from operating service. Otherwise, Transit argued, Transit's investors would be deprived of part ($4,141,771) of the value of their properties at the time the properties were first devoted to public service. The Commission remained steadfast in using a "book-to-market approach" despite specifically conceding that its approach did confiscate the property interests of Transit's investors. A141-A142.

On appeal to the Court of Appeals, Transit raised many issues concerning the computation of restitution and specifically raised the issues described above. Tran-

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[12] This method involves calculation of the gain by subtracting the cost or book value of the property when it was placed in service from its market value when it was taken out of service.

[13] This method uses market value of the property as the subtrahend rather than the cost or book value.

sit first argued that restitution should have been limited to the aggregate of excess fares collected during the period in which the invalid fare increase under Order No. 773 was in effect. Transit argued that since Order No. 773 was superseded by rate orders that were *never* challenged by farepayers, the Commission engaged in retroactive ratemaking by retroactively invalidating presumptively valid rate orders subsequent to Order No. 773. Such actions, Transit argued, deprived Transit of its property without due process of law, in violation of prior decisions of this Court.

Transit also argued before the Court of Appeals that the gain on non-depreciable property was improperly attributed by the Commission to the farepayers rather than Transit's investors and that such action resulted in an unconstitutional confiscation of Transit's property in violation of prior decisions of this Court.

In addition, Transit contended before the Court of Appeals, that in calculating gain allocable to farepayers, the Commission should have employed the "market-to-market" method of computing property appreciation rather than the "book-to-market" method. Transit argued that because the market value of the properties on August 14, 1956 exceeded their booked cost to Transit on that date by $4,141,771, the "book-to-market" method deprived Transit and its investors of that part of the value of their properties at the time they were first devoted to public service.

The Court of Appeals rejected all of Transit's arguments insofar as they relate to the issues raised in this petition. In an opinion written by Chief Judge Robinson, the Court of Appeals upheld the Commission's determination that the maximum amount of restitution would be the fare increment authorized by Order No. 773 over the remainder of Transit's life as a public utility. A208-

A209. In addition, the Court of Appeals concluded that the farepayers rather than Transit's investors were entitled to receive the benefit of the gain on Transit's non-depreciable properties. Finally, the Court of Appeals upheld the Commission's use of the "book-to-market" formula. A198-A199.

Judge MacKinnon filed a vigorous dissent in which he expressed his agreement with Transit's arguments as raised in this petition. Specifically, Judge MacKinnon found that the Commission had violated basic principles of public utility regulation and the express statutory language of the Compact by allocating to farepayers rather than Transit's investors the gain on non-depreciable assets when transferred out of service. A226-A231. In addition, Judge MacKinnon concluded that by not limiting the restitutionary period to the 277 days that Order No. 773 was in effect, the Commission, with the Majority opinion's blessing, was engaging in unlawful retroactive ratemaking. A231-A250. Finding that the Commission's "base fare" rationale constituted "an untimely, outlawed and unprecedented departure from the statutory presumption of reasonableness and validity that accompanies duly adopted rate orders", Judge MacKinnon accused the Majority of engaging in "*post hoc* rationalization." A249. Judge MacKinnon also expressed the view that the use of Transit's "market-to-market" method of calculating gain allocable to the farepayers "may better accord with investors' entitlement to the benefit of their bargain" and also represented "a better approximation of real value, since book value is usually a poor indicator of an item's worth." A230.

Upon issuance of the Court of Appeals decision, Transit applied for a rehearing and suggested that the court hear the appeal *en banc*. On September 14, 1988,

the Court of Appeals denied Transit's petition for rehearing and suggestion for rehearing *en banc*. A486-A487. Accordingly, Transit filed the instant petition.

Reasons for Granting the Writ

The instant petition raises issues of crucial importance in maintaining the integrity of administrative decision-making and the delicate balance between the rights of utility shareholders and the public. In reviewing the Commission's calculation of restitution, the Court of Appeals turned its back on basic due process concerns, administrative law principles and settled judicial precedent of this Court. In so doing, the Court of Appeals breathes dangerous uncertainty into the ratemaking process and increases the risk to both public utilities and their investors. Judicial intervention by this Court is essential to alleviate such inherent dangers.

In calculating the appropriate amount of restitution to be paid by Transit, the Commission did not limit itself to the fare increase declared invalid under Order No. 773. Instead, in absolute disregard of due process principles, the Commission retroactively invalidated subsequent valid rate orders which had *never* been challenged by farepayers and ordered restitution of the fare increases granted by such orders. The Commission's action violated the clear proscription against retroactive ratemaking recognized by this Court and the regulatory scheme in force for the District of Columbia.

The compelled restitution of fares collected under valid rate orders threatens both the integrity of the administrative process and the ability of the public to place reliance upon administrative actions. Utility companies such as Transit could neither raise capital, budget expenses, nor plan for growth if historic rates validly promulgated were subject to second-thoughts and post-hoc

rationalizations several years later. If utility companies can not rely on the valid rates issued through the administrative process, the entire regulatory structure necessarily collapses. The Court of Appeals magnifies these threats by placing a judicial imprimatur on the Commission's unprincipled restitution award.

The Commission's adoption of an inappropriate method of computing restitution as to non-depreciable properties also raises serious regulatory concerns. The method adopted by the Court of Appeals violates established precedent of this Court and contravenes fundamental utility regulation principles. The Court of Appeals effectively has fashioned a sweeping new principle of ratemaking, and has brushed aside numerous final administrative and judicial decrees directly contrary to this new rule. Strikingly, the Court of Appeals now applies this new rule to deny property appreciation earned as early as 1958.

By refusing to recognize Transit's investors' right to own the increase in value of non-depreciable property transferred out of public service, the Commission and Court of Appeals set a dangerous precedent that will serve to greatly discourage investment in public utility stock. If the opinion below is permitted to stand, potential utility investors and creditors will be compelled to assume not only the risk that the "rules of the game" at the time of their investment may not have continuing application in the future, but also the risk that the financial picture of the utility at the time of their investment is subject to complete recalculation some time in the unlimited future. That new element of uncertainty injected by the court into utility investment will be immediately and directly reflected in higher costs for utility capital and credit.

Finally, absent action by this Court, the precedent of using "book-to-market" calculations of fare restitution will send a signal to administrative agency decision-makers that deprivation of property without due process is acceptable. Such a signal would have disastrous consequences.

I.

The Court of Appeals Abandoned Principles of Due Process by Upholding Retroactive Ratemaking

The Commission's actions in fashioning the time period for restitution of increased fares under Order No. 773 clearly amounted to retroactive ratemaking without due process. The Commission erroneously determined that the maximum amount of restitution allowable in *DCC-I* was the fare increase authorized by Order No. 773 "over the remainder of Transit's life as a public utility." That "life", of course, included the years after October 29, 1968, when valid and unchallenged rates superseding Order No. 773 were in effect.[14] 485 F.2d at 823-24. The inclusion in the restitutionary award of any fares earned after Order No. 773 was superseded by subsequent valid rate orders is tantamount to invalidating the valid rate orders retroactively. By upholding this arbitrary action, the Court of Appeals impermissibly extended its jurisdiction to the review of rate orders which were never challenged before the Commission or the courts. Such results should not be allowed to stand because they show "that the limits of due process have been overstepped." *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

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[14] WMATC Order No. 882, dated October 29, 1968, granted a fare increase to Transit and created a new fare schedule superseding Order No. 773. A332-A349.

A. Retroactive Ratemaking Violates Precedent Of This Court

By upholding the restitutionary award in this case, the Court of Appeals has abandoned the long-standing rule against retroactive ratemaking which this Court has espoused since 1926. *Bd. of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 32 (1926) ("Profits of the past cannot be used to sustain confiscatory rates for the future."). More recently, this Court restated that rule in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981):

> Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively. . . . This rule bars "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate."

Id. at 578 (quoting *City of Piqua v. F.E.R.C.*, 610 F.2d 950, 954 (D.C. Cir. 1979)).[15] For decades, this Court and lower courts have consistently opposed retroactive ratemaking. *U.S. v. Morgan*, 307 U.S. 183, 192 (1939); *Arizona Grocery Co. v. Atchison, T & S.F. Ry.*, 284 U.S. 370, 390 (1932) (where Commission has approved the maximum reasonable rate carrier may charge, it may not later require carrier that adhered to the established rules to pay reparations measured by what Commission now determines it should have decided earlier to be a reasonable rate); *A.T.&T. Co. v. F.C.C.*, 836 F.2d 1386, 1394 (D.C. Cir. 1988) (Starr, J., concurring); *Sea Robin*

[15] The fact that the Court of Appeals chose to ignore this rule in the present action is especially troubling in light of the fact that just five months after its decision here, it expressly relied on the "well-established prohibition against retroactive ratemaking" in *Alabama Power Co. v. I.C.C.*, 852 F.2d 1361, 1373 (D.C. Cir. 1988).

Pipeline Co. v. F.E.R.C., 795 F.2d 182, 189 n.7 (D.C. Cir. 1986) ("FERC may not order a retroactive refund based on a *post hoc* determination of the illegality of a filed rate's prescription."); *S. California Edison Co. v. F.E.R.C.*, 805 F.2d 1068, 1070 (D.C. Cir. 1986); *City of Piqua v. F.E.R.C.*, 610 F.2d at 954; *Nader v. F.C.C.*, 520 F.2d 182, 202 (D.C. Cir. 1975) (rule against retroactivity is a "cardinal principal of ratemaking"); *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 21 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951).[16] It is simply unfathomable that the Court of Appeals chose to ignore this longstanding rule in the present action.

B. Retroactive Ratemaking Contravenes The Applicable Statutory Scheme

The Court of Appeals' retroactive invalidation of valid rate orders subsequent to Order No. 773 stands in direct contravention of the entire legislative and statutory scheme of Congress and the District of Columbia mandating that ratemaking be prospective and that rates be accepted as valid absent a challenge conducted in strict accordance with the requirements of due process. The Commission's obvious side-stepping of these important mandates, coupled with the Court of Appeals' explicit approval of such actions, plainly constitutes a denial of due process to Transit in this case.

The Congressional Act which granted Transit its franchise to operate a mass transportation system in the Washington Metropolitan Area specifically provided that

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[16] State law cases and statutes mirror federal opposition to retroactive ratemaking. *See, e.g., Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 380 A.2d 126, 148 (D.C. 1977), *cert. denied*, 444 U.S. 926 (1979) (commission cannot give "perpetual legal effect" to an unlawful order); *Washington Gas Light Co. v. Pub. Serv. Comm'n*, 452 A.2d 375, 379, 382-83 (D.C. 1982), *cert. denied*, 462 U.S. 1107 (1983); *Commonwealth v. Old Dominion Power Co.*, 184 Va. 6, 34 S.E.2d 364, *cert. denied*, 326 U.S. 760 (1945).

the initial schedule of rates would continue in effect "until superseded" and that upon the filing of a new schedule of rates, "such new schedule shall become effective on the tenth day *after*" the date Transit files such new rates with the Commission. Franchise Act, 70 Stat. at 599 (emphasis added). Similarly, D.C. Code § 43-702 (1967) specifically provided that public utilities changing their schedules of rates on file with the Commission could do so only with "the approval of the Commission" and that such rates "shall take effect within such reasonable time *thereafter* as the Commission shall prescribe." D.C. Code § 43-901 (1981) (codifying D.C. Code § 43-702 (1967) (emphasis added). The statutory scheme thus contemplated *prospective* ratemaking.

With respect to the specific procedure required under the statutory scheme to rescind or modify any rate order such as the rate orders retroactively invalidated in this case, D.C. Code § 43-702 (1967) specifically provided:

> The Commission may, at any time, *upon notice to the public utility and after opportunity to be heard* . . . rescind, alter, or amend any order fixing any rate or rates, tolls, charges, or schedules, or any other order made by the Commission, and certified copies of the same shall be served and take effect as herein provided for original orders.

D.C. Code § 43-902 (1981) (codifying D.C. Code § 43-702 (1967)) (emphasis added). The D.C. Code also specifically provided that Commission rate orders were presumptively reasonable and remained in force until specifically challenged in an action brought for that purpose:

> All rates, tolls, charges, time and condition of payment thereof, schedules, and joint rates fixed by the Commission shall be in force and shall be

> *prima facie reasonable until finally found otherwise in an action brought for that purpose.*

D.C. Code § 43-903 (1981) (codifying D.C. Code § 43-703 (1967)) (emphasis added). *See also* D.C. Code § 12-301 (1981) (statute of limitations for challenges to a rate must be brought within three years); *United States v. Pub. Util. Comm'n*, 158 F.2d 533, 537-38 (D.C. Cir. 1946), *cert. denied*, 331 U.S. 816 (1947) (rate orders become "conclusive when no person affected thereby avail[s] himself of the right of appeal"—such order cannot be retroactively "brand[ed]. . . as illegal"); *Commonwealth v. Old Dominion Power Co.*, 184 Va. 6, 34 S.E.2d 364, *cert. denied*, 326 U.S. 760 (1945) (applying laws similar to D.C. Code provisions and finding statutes designed to fix rates prospectively rather than retroactively).

Taken together, these provisions offer a clear statutory directive that rate increases become effective "after" issuance of Commission orders authorizing them and cannot be revised without a due process hearing. The rate orders issued between Order No. 773 and Order No. 1052 (i.e. Nos. 882, 900 and 984) were *never* challenged "in an action" or invalidated or revised through a notice and comment hearing as required under D.C. Code § 43-702. Accordingly, each of those orders must be deemed valid for the entire period during which they were in effect. The Court of Appeals and the Commission ignored this statutory presumption of reasonableness, and in its place, applied a *de facto* presumption of unreasonableness based on the prior—and essentially unrelated—invalidation of Order No. 773. Restitution in this case should have been awarded only for overcharges received during the period that Order No. 773 was in effect, *i.e.*, until it was superseded by Order No. 882 on October 29, 1968.

Neither the Court of Appeals nor the Commission had the power to give "perpetual legal effect" to invalid rate Order No. 773 and ignore subsequent rate orders (Nos. 882, 900 and 984) issued through the administrative process with proper notice and hearing.[17] Quite the contrary, each successive rate order is properly understood as an *independent* expert prediction, based on all relevant facts and circumstances, as to the fare necessary to guarantee the utility a reasonable rate of return. A332-A485. The Court of Appeals' adoption of the Commission's approach in this action breached that guarantee to Transit.

C. The Commission's Post Hoc Rationalization Violated Due Process

In an obvious but misdirected attempt to avoid the retroactivity problem raised by perpetuating the invalidity of Order No. 773 under circumstances where it was superseded on October 18, 1968 by an unchallenged rate order, the Court of Appeals blindly adopted the Commission's conclusion that the subsequent rate orders were "incremental" to and "based on" Order No. 773. The Commission's post-hoc rationalization is precisely the type of arbitrary action this Court has previously warned against.

In *West Ohio Gas Co. v. Pub. Util. Comm'n*, 294 U.S. 79 (1935), this Court considered a challenge to the setting of utility rates by the Ohio Public Utilities Commission. The Commission intended to fix a schedule of charges such that West Ohio Gas would enjoy a net income of $11,391.39. In fixing rates to be effective during August 1929 through February 1933, the Commission

[17] *Potomac Elec. Power Co.*, 380 A.2d at 126; *Williams v. WMATC*, 415 F.2d 922 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969).

ascertained gross income and operating expenses by confining itself to 1929 financial data even though "full and unchallenged" financial data for 1930 and 1931 was available. In holding such a decision to be violative of due process, the Court noted:

> We think the adoption of a single year as an exclusive test or standard imposed upon the company an arbitrary restriction in contravention of the Fourteenth Amendment and of "the rudiments of fair play" made necessary thereby. . . . The earnings of the later years were exhibited in the record and told their own tale as to the possibilities of profit. To shut one's eyes to them altogether, to exclude them from the reckoning, is as much arbitrary action as to build a schedule upon guesswork with evidence available.

Id. at 81-82.

Similarly, in the present case, the Commission and the Court of Appeals closed their eyes to the presumptively valid and "unchallenged" rate orders which superseded Order No. 773. As in *West Ohio Gas,* the superseding rate orders "told their own tale" as to the reasonableness of rates charged by Transit. By presuming, in the face of contrary evidence, that Order No. 773 served as a "base" for future rate orders, the Commission and Court of Appeals engaged in the precise type of arbitrary rate restriction found by this Court to contravene due process and "the rudiments of fair play." *Id.* at 81. *See also Bd. of Pub. Util. Comm'rs v. New York Tel. Co.,* 271 U.S. 23, 32 (1926) ("Profits of the past cannot be used to sustain confiscatory rates for the future."); *Potomac Elec. Power Co.,* 380 A.2d at 134 ("rate maker may not rely on out-of-date information when more recent actual experience . . . is available.").

The Commission and Court of Appeals' conclusion that the rate orders subsequent to Order No. 773 were merely "incremental" constitutes nothing more than a *post hoc* rationalization for retroactively invalidating the rate orders. There was no statement or assertion in any of the four superseding orders that the rates fixed by such orders were incremental or were not based on the most recent financial data before the Commission. A332-A485. Rather, each subsequent fare order represented, at the time of its issue, a reasonable charge for mass transit service. The Commission and Court of Appeals' simply conjured up the "incrementalism" rationale in an attempt to permit a retroactive attack on such rate orders long beyond the date that the statute of limitations would permit such attacks. *See* D.C. Code § 12-301 (1981). Such a due process violation cannot be upheld.

This Court has warned against this type of arbitrary action in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) and *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156 (1962). In *Chenery*, this Court stressed the "fundamental rule of administrative law . . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency.*" 332 U.S. at 196 (emphasis added).The same reasoning applies by analogy when as here, the rate orders subsequent to Order No. 773 have been retroactively modified on the basis of some element not announced in each order. Due process principles have been violated.

II.

The Court of Appeals Upheld the Confiscation of Property from Transit Without Due Process by Allocating to the Ratepayers the Gains Realized on Non-Depreciable Property

The Court of Appeals' incorrect allocation to ratepayers of the gain on non-depreciable assets transferred out of service disregards established precedents of this and other courts and ignores traditional principles of public utility regulation. Indeed, the Court of Appeals opinion is so contrary to established law and reason that it significantly threatens the legitimate expectations of all those who invest in public utilities such as Transit.

As Judge MacKinnon noted in his dissent below, the long-standing "practice in utility cases [is] to allocate gain or loss on nondepreciable assets to investors, rather than to consumers. . . . ." A229. In *Bd. of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23 (1926), this Court enunciated the rule of law that *investors* in public utilities, rather than the utilities'customers, are the owners of the company's property. *Id.* at 32. In so holding, the Court explained the interrelationship between a public utility and its customers:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying their bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.

Id. This Court also noted that: "just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service". *Id.*

at 31. The Court of Appeals blinds itself to this important precedent and, as Judge MacKinnon aptly noted, simply "blazes its own trail.[18]" A230.

Further, as Judge MacKinnon recognized, the Court of Appeals unilaterally "rejected the unanimous decisions of expert regulatory agencies that have specifically relied on [this] Court's decision in *New York Telephone*." A230. The uniform result of administrative decisions within the District of Columbia is that allocation of gain in the disposition of non-depreciable assets inures to *investors*. *See DCC-I*, 485 F.2d at 795.[19] The reason that farepayers have not been given the benefit of the gain from non-depreciable property is that, unlike depreciable property, the farepayers have never paid for the use of the property.[20] The investors *necessarily* bear

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[18] *See also City of Lexington v. Lexington Water Co.*, 458 S.W.2d 778, 780 (Ky. 1970); *Philadelphia Suburban Water Co. v. Pennsylvania Pub. Util. Comm'n*, 58 Pa. Commw. 272, 427 A.2d 1244, 1246-48 (1981); *Boise Water Corp. v. Idaho Pub. Util. Comm'n*, 99 Idaho 158, 578 P.2d 1089, 1093 (1978).

[19] *See D.C. Transit Sys., Inc.* (Order No. 245), 48 P.U.R.3d 385, 399 (WMATC 1963). Holding that the utility's ratepayers were entitled to the gains on the sales of land, the Commission explicitly recognized that "[w]hile the ratepayers may have a claim to *depreciable property*, at least to the extent of the depreciation reserves, *no such claim can be directed to land.*" *Id.* (emphasis added). *See also D.C. Transit Sys., Inc.*, (Order No. 4577), 30 P.U.R.3d 405, 409 (D.C. Pub. Util. Comm'n 1959) (sale of land profits treated as "proper credit to earned surplus" with gains benefitting investors); *D.C. Transit Sys., Inc.* (Order No. 563), 63 P.U.R.3d 32, 34 (WMATC 1966) (same).

[20] The rationale underlying the rule that gain from the disposition of non-depreciable assets belongs to the utility's investors derives from the fact that investors bear the risk of loss. Unlike depreciable assets where the ratepayers maintain the shareholders' investment through the depreciation reserves and bear the risk of loss of obsolescence, non-depreciable assets, such as land, are not subject to depletion allowances and do not become obsolete. In the event that land is sold below cost, the risk of loss is borne by the investors. Accordingly, as Judge MacKinnon noted: "[c]ustomers have no interest in profits on dispositions of land, since they make no contribution to capital cost and have therefore not reimbursed investors for their capital outlay." A229-A230.

the burden and risk with respect to non-depreciable property and the only appropriate balancing of interests is to compensate investors for that burden. Farepayers should not be gratuitously benefitted by, and investors should not be impermissibly deprived of, the appreciation of Transit's non-depreciable property. Nevertheless, the Court of Appeals did precisely this by depriving Transit's shareholders of the benefits of their profitable investment in land.[21]

By retroactively reversing this uniformly adopted accounting method, the Court of Appeals and the Commission also violated procedural due process guaranteed by the Fifth Amendment. *See United States v. Macdaniel*, 32 U.S. (7 Pet.) 1, 14, 15 (1833); *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1864); *Douglass v. County of Pike*, 101 U.S. 677 (1880); *Green County v. Conness*, 109 U.S. 104 (1883); *Edward Hines Yellow Pine Trustees v. Martin*, 268 U.S. 458 (1925).

In formulating its financial planning, Transit relied upon the consistently applied and generally accepted ratemaking principles that were applicable at the time of the transfers. It decided whether to retain these properties or sell them, whether to leave them vacant or rent

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[21] Furthermore, the Court of Appeals opinion denies Transit due process because it permits past profits to "sustain confiscatory rates of the future", a proposition that, until now, has been soundly rejected as violative of due process guarantees. *Newton v. Consol. Gas Co.*, 258 U.S. 165, 175 (1922); *Bd. of Comm'rs v. New York Tel. Co.*, 271 U.S. at 31. Transit "earned" income at the time it transferred land to non-operating status. The amount of that income was the appreciation over cost at the time of the transfer. Some of these transfers occurred as early as 1958. Yet the Court of Appeals has now said that in setting Transit's future rates in 1968 and again in 1970, the Commission should have credited as an offset to such future rates this income that Transit "earned" in prior years. To permit this holding to stand would be to emasculate due process protections to which regulated utilities have been historically and necessarily entitled.

them, and the extent to which debts should be incurred upon them as security, all based upon a set of established principles in effect at that time. It made decisions about its ability to expand operations and operating expenses based upon the fact that its earned surplus included gains on land it already had sold and would include gains on land it could sell. Similarly, investors and creditors made decisions based upon the same assumptions. Transit, its parent, its parent's more than 7,000 shareholders, and Transit's creditors were all entitled to rely upon these principles which had been approved by decisions of this Court and by numerous final rate orders of the Commission.

III.

The Court of Appeals Upheld the Confiscation of Property from Transit Without Due Process by Depriving Transit of the Market Value of Property When First Devoted to Public Service

Even if the appreciation in Transit's properties while in public service is attributable to the farepayers, Transit should have been allowed to retain the difference ($4,141,771) between the book value of the properties acquired from Capital at 11:55 p.m. on August 14, 1956 and the uncontested market value of those properties at the time they first were devoted to public use at 11:59 p.m. on August 14, 1956. Because Transit made a purchase at a price below market when it acquired the assets of Capital, that difference in value between book value and market value prior to the property being devoted to public use belonged to Transit's investors once Transit purchased and paid for the property. If Transit had closed its doors at 11:58 p.m. on August 14, 1956, after it acquired these properties, but before it devoted

them to public use, it would have been entitled to keep whatever it could get on the market for the properties it owned.

When Transit devoted such properties to public use, it booked the cost of the properties at prices not "anywhere near their true market value." *DCC-I*, 485 F.2d at 815. Transit introduced appraisals into evidence to show the market value of the properties when devoted to public service at 11:59 p.m. on August 14, 1956.[22] Using such information, the Commission recognized that using a "market-to-market" approach denied "Transit's investors the benefit of their bargain purchase" and recommended measuring the farepayer's restitution by comparing market value at the end with market value at the beginning of the property's useful life. A141-A142. This is what Transit suggested below but that suggestion was rejected by the Court of Appeals.

Consistent with due process, the farepayers cannot be entitled both to (1) the difference between the booked value and market value of the properties *before* devoted to public use; and (2) the subsequent appreciation of the assets during their tenure as operating properties. As this Court recognized in *Chicago M. and St. P. R.R. v. Minnesota*, 134 U.S. 418, 458 (1890):

> If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is de-

[22] Of the $13,540,000 booked as the cost of Capital's properties, $1,884,584 represented the book value of the properties at issue in the remand proceedings. At the hearing before the Commission, Transit introduced uncontested evidence that the market value of those properties at 11:59 p.m. on August 14, 1956 was $6,026,355. It is the difference of $4,141,771 which Transit was deprived of by the "book-to-market" valuation measurement.

> prived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

Id. at 458. See *generally* E. Nichols, *Ruling Principles of Utility Regulation: Rate of Return* 10-13 (1955). Depriving Transit's investors of the market value of the property prior to its devotion to public use, without compensation, is plainly confiscatory and violative of the Fifth Amendment to the Constitution. The Court of Appeals ignored this obvious result.[23]

In adopting the "book-to-market" approach, the Court of Appeals failed to recognize that the Compact itself provided that investors, having undertaken a risk of loss, would be entitled to recover a return on their investment:

> It is hereby declared as a matter of legislative policy that in order to assure the Metropolitan District of an adequate transportation system operating as private enterprises *the carriers therein*, in accordance with standards and rules prescribed by the Commission, *should be afforded the opportunity of earning such return as to make the carriers attractive investments to private investors*. As an incident thereto, the opportunity to earn a return of at least 6½ per centum net after

[23] In addition, Transit's suggestion of a use of a "market-to-market" method would provide a better approximation of real value, since book value is usually a poor indicator of an item's worth. *See generally* G. Johnson and J. Gentry, *Finney's Principles of Accounting*, 367, 372 (8th ed. 1980).

> all taxes properly chargeable to transportation operations, including but not limited to income taxes, on gross operating revenues, shall not be considered unreasonable.

74 Stat. at 1040-41 (emphasis added). This declaration adopted, nearly verbatim, the language used by Congress in 1956 when it adopted the Franchise Act granting Transit its franchise to operate a mass transportation system in the Washington Metropolitan Area. The Franchise Act contained the additional policy declaration that "Congress will maintain a continuing interest in the welfare of the Corporation and its investors." 70 Stat. at 599.

The Commission and Court of Appeals' actions in this case were entirely inconsistent with maintaining "a continued interest in the welfare of the Corporation and its investors." Instead, the Commission and the Court of Appeals deprived Transit's investors of part of the value of their property *prior to* its devotion to public service. Such a result should not stand undisturbed.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

D.C. TRANSIT SYSTEM, INC.

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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December 13, 1988

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Hearing Officer Decision

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION WASHINGTON, D.C.

REPORT OF THE HEARING OFFICER

IN THE MATTER OF:	Served February 17, 1978
REMANDS from United States Court of Appeals for the District of Columbia Circuit of D. C. Transit System, Inc., proceedings:	
Application of D. C. Transit System, Inc., for Authority to Increase Fares	Application No. 226 Docket No. 32
Application of D. C. Transit System, Inc., for Authority to Increase Fares	and Application No. 344 Docket No. 101
Application of D. C. Transit System, Inc., for Authority to Increase Fares	Application No. 453 Docket No. 156
Application of D. C. Transit System, Inc., for Authority to Increase Its Fleet in Lieu of Purchasing Buses	and Application No. 436 Docket No. 145
Application of D. C. Transit System, Inc., for Authority to Increase Fares	Application No. 613 Docket No. 216

HEARING OFFICER:

W. R. STRATTON, Chairman, Washington Metropolitan Area Transit Commission

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D. C. Transit System, Inc., 81 P.U.R.3d 113 (WMATC 1969).

D. C. Transit System, Inc., 85 P.U.R.3d 1 (WMATC 1970).

UNREPORTED ORDERS:

Order No. 289 (WMATC, unreported) July 29, 1963.

Order No. 381 (WMATC, unreported) September 11, 1965.

Order No. 634 (WMATC, unreported) August 19, 1966.

Order No. 684 (WMATC, unreported) March 13, 1967.

Order No. 718 (WMATC, unreported) July 3, 1967.

Order No. 773 (WMATC, unreported) January 26, 1968.

Order No. 882 (WMATC, unreported) October 29, 1968.

Order No. 984 (WMATC, unreported) October 24, 1969.

Order No. 1052 (WMATC, unreported) June 26, 1970.

Order No. 1317 (WMATC, unreported) April 4, 1974.

Order No. 1354 (WMATC, unreported) October 10, 1974.

Order No. 1355 (WMATC, unreported) October 10, 1974.

Order No. 1356 (WMATC, unreported) October 10, 1974.

Order No. 1358 (WMATC, unreported) October 10, 1974.

Order No. 3592 (D.C.P.U.C., unreported) November 27, 1957.

STATUTES:

District of Columbia Code, Title 12, Section 301(8) (1973 Ed.).

Transit Franchise Act, P.L. 70-757, T. I, part 1, Sec. 7, 70 Stat. 598, 599 (1956).

Public Law 91-106, October 31, 1969, 83 Stat. 176.

Hearing Officer Decision

I. *Procedural History*

In June 1973, the United States Court of Appeals for the District of Columbia Circuit (Court) handed down six opinions in appeals of orders of this Commission relating to D. C. Transit System, Inc. (Transit or company).[1] Four of these cases remanded orders of this

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[1] They are:

(a) *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission,* (No. 21865) 158 U.S.App.D.C. 7, 485 F.2d 786 (D.C. 1973), *cert. denied* 415 U.S. 935, 94 S.Ct. 1451, 93 L.Ed.2d 493. For convenience, this case is sometimes referred to in this report as *"DCC-I"*.

(b) *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission,* (No. 22450) 158 U.S.App.D.C. 68, 485 F.2d 847 (D.C. 1973).

(c) *Leonard N. Bebchick v. Washington Metropolitan Area Transit Commission,* (Nos. 23720, 23747) 158 U.S. App.D.C. 79, 485 F.2d 858 (D.C. 1973). For convenience, and to distinguish it from another seminal case involving D. C. Transit System, Inc. *(Bebchick v. P.U.C.,* 115 U.S.App.D.C. 216, 318 F.2d 187 (D.C. 1963), *cert. denied* 373 U.S. 913) heretofore known as *the Bebchick* case, this case is sometimes referred to in this report as *"Bebchick-II"*.

(d) *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission,* (No. 23958) 158 U.S.App.D.C. 102, 458 F.2d 881 (D.C. 1973).

(e) *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission,* (Nos. 24398, 24415 and 24428) 158 U.S.App.D.C. 107, 485 F.2d 886 (D.C. 1973), *cert. denied* 415 U.S. 935, 94 S.Ct. 1451, 93 L.Ed.2d 493. For convenience this case sometimes is referred to in this report as *"DCC-II"*.

(f) *Diana K. Powell v. Washington Metropolitan Area Transit Commission,* (No. 21750) 158 U.S.App.D.C. 301, 485 F.2d 1080 (DC. 1973).

Commission for further proceedings,[2] and three of those were petitioned to certiorari.[3] Certiorai was denied in every instance,[4] and in February 1974, the Commission took up the remanded orders. Management of the proccedings on remand was the first order of business.

Pursuant to notice[5] a prehearing conference was convened in May 1974 to define issues and establish procedures. We concluded that the common issues in *DCC-I, DCC-II,* and *Bebchick-II*[6] relating to the increase in value of Transit's real property should be litigated[7] in one proceeding.[8] Thus grouped, these remanded dockets have come to be known as "the properties case".[9] Hearings were conducted on 27 days between February 1 and November 3, 1977, yielding 2550 pages of transcript, 115 exhibits and various supplemental filings. A subsequent hearing was held on February 8, 1978, to accept two stipulations by the staff and Transit. In addition, two staff exhibits were marked and received in the record.

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[2] *DCC-I, Bebchick-II, DCC-II* and *D. C. Transit v. WMATC, supra,* n.1(a) (c) (d) and (e).

[3] *DCC-I, Bebchick-II,* and *DCC-II, supra,* n.1(a) (c) and (e).

[4] *Ibid.*

[5] Order No. 1317 (WMATC, unreported) April 4, 1974.

[6] *DCC-II* and *Bebchick-II* also involved unique issues which were dealt with separately; see our Order Nos. 1354, 1356, and 1358 (WMATC, unreported) October 10, 1974.

[7] In *DCC-I, supra,* n.1(a) at 829 the Court had said, "[o]ur disposition, too, leaves interested parties free to litigate to a complete and final conclusion the rights and obligations we have identified." This freedom to litigate has been availed of unstintingly by the parties, and these proceedings have been every bit as extensive as Transit's major fare cases in past years.

[8] Order No. 1354, *supra,* n.6.

[9] Referring to the caption, Dockets 32 and 101 gave rise to *Bebchick-II,* Docket 156 to *DCC-I,* and Docket 216 to *DCC-II.*

II. *Substantive History*

To aid those whose knowledge is limited by lack of previous acquaintanceship or the attrition of memory, some stage-setting may be in order lest this document and the issues it discusses by unintelligible.

A. *Bebchick-II*

Bebchick-II is a very old friend. Its origins go back to our Order No. 245 of April 12, 1963.[10] As is pertinent to this particular proceeding, *Bebchick-II* involves an issue treated in our Order No. 381,[11] No. 564[12] and No. 981[13] and the related appeals and remands.[14] These Commission orders and Court opinions are the saga of the "depreciation deficiency" found to exist as of August 15, 1963, by the Commission in Order No. 381.[15]

For the full story the reader is referred to those orders and opinions. It is sufficient here to record that August 15, 1963, was a red-letter day in the history of mass transit in Washington, for it was the day that the last

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[10] *D. C. Transit System, Inc.,* 48 P.U.R.3d 385 (WMATC 1963). This is the order that resulted from Application No. 226 in Docket No. 32. Docket No. 32 is not involved in this particular set of hearings; Docket No. 32 appears in the caption only because it has been consolidated with Docket No. 101. The Docket No. 32 issue involved in the remanded cases was the subject of our Order No. 1356, *supra,* n.6.

[11] (WMATC, unreported) September 11, 1965.

[12] *D. C. Transit System, Inc.,* 64 P.U.R.3d 45 (WMATC 1966).

[13] *D. C. Transit System, Inc.,* 81 P.U.R.3d 113 (WMATC 1969).

[14] *Williams v. WMATC,* 134 U.S.App.D.C. 342, 415 F.2d 922 (D.C. *en banc,* 1968) *cert. denied* 393 U.S. 1081, 89 S.Ct. 860, 21 L.E.d.2d 773 (1969), was the result of the appeal of Order No. 564, *supra,* n.12. On remand after the *Williams* case, *supra,* the Commission issued Order No. 981, *supra,* n.13, which was, in its turn, appealed in *Bebchick-II* and again returned to us by the Court.

[15] *Supra,* n.11.

trolly car would run.[16] This epoch-ending event had more than a nostalgic effect on the Commission: it moved us to examine Transit's books[17] to determine whether the depreciation accruals over the years had been sufficient in amount to retire the booked investment in the properties that would be retired in fact as a consequence of Transit's conversion to all-bus operations.[18]

We determined in Order No. 381[19] that there had been an insufficiency of about $1,223,000 in depreciation accruals against these properties. In Order No. 564[20] it was determined that the farepayers should make up most of this deficiency through a charge of $806,168 against the Riders' Fund created as a result of the first *Bebchick* case.[21] Order No. 564 was appealed both by Transit, who wanted the entire depreciation deficiency charged against the farepayers, and by representatives of the farepayers, who wanted none of it charged against the riders. The decision in *Williams*[22] resolved these issues, holding that, indeed, the farepayers were ultimately ob-

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[16] This was required by the legislation conferring the local mass transit franchise on Transit. P.L.70-757, T.I, part 1, Sec. 7, 70 Stat. 598, 599 (1956).

[17] Order No. 289 (WMATC, unreported) July 29, 1963.

[18] When the properties were retired the related remaining investment was moved "below the line" on the books. The consequence is that depreciation can no longer be charged as a utility expense to be paid by the farepayers, and the investors do not recover the investment through depreciation charges.

[19] *Supra,* n.11.

[20] *Supra,* n.12.

[21] *Bebchick v. Public Utilities Commission,* 115 U.S.App.D.C. 216, 232-33, 318F.2d 187, 203-04 (D.C. *en banc* 1963) *cert. denied* 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963). This opinion reversed a P.U.C. fare increase order and set up on Transit's books a reserve for the benefit of the farepayers. At the time of Order No. 564 there was more than $806,000 standing to the farepayers' credit in the Riders' Fund—actually about $2,167,000—but $1,350,000 was used to cover the revenue requirement found in Order No. 564.

[22] *Supra,* n.14.

ligated for the entire depreciation deficiency of $1,058,856[23] and not just $806,168 as the Commission had found. The Court found it acceptable to make up the entire depreciation deficiency from the Riders' Fund.[24] But, the Court held, the Riders' Fund should be surcharged only to the extent that Transit's "excess earnings" were insufficient to offset the deficiency in the depreciation reserve.[25] On the resulting remand, protestant Bebchick urged the Commission to look not only to "excess earnings" as an alternative to the Riders' Fund as a source of offset to the depreciation deficiency as the Court had ordered in *Williams,* but also to the appreciation in value of six of Transit's real properties that had been retired from utility service during Transit's operation of the mass transit franchise.[26] The Commission declined[27] (erroneously, as it was to turn out) and determined that Transit had not enjoyed any excess earnings which could be applied against the depreciation deficiency.[28]

Order No. 981 was, in its turn, appealed, leading to the decision in *Bebchick-II* that the Commission must consider the appreciation in value of the depreciable portion[29] of the six properties as a source of compensation to Transit for the under-accrual of depreciation. The

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[23] It has been reduced from the original amount of $1,223,000 by adjustments and payments which do not bear on the issues in this proceeding.

[24] *Williams, supra,* n.14 at 956, 957.

[25] *Ibid.* at 958, 977.

[26] Of these properties, five had been transferred to subsidiaries: Central Garage (Georgia Avenue Estates), Northeastern Garage (4th Street Estates), M Street Shop (M Street Estates), Navy Yard Carhouse (L Street Estates), and the General Office Building (3600, Inc.); and one continued to be held by Transit, but appeared "below the line" on Transit's books: Grace Street Shop.

[27] Order No. 981, *supra,* n.13 at 128.

[28] *Ibid.*

[29] *I.e.,* the buildings, but not the land.

depreciation deficiency issue thus is again before the Commission, ". . . to determine the fair market value of the properties[30] at the time of the transfer and compute the net gain to Transit, taking into account taxes and costs which might have reduced the gain if the properties had been sold."[31]

This "net gain", if any, is to be regarded as compensation to Transit for the depreciation reserve deficiency.[32] Thus did *Bebchick-II* give rise to the fact-finding task undertaken in this proceeding, a task undertaken, as the Court suggested,[33] in conjunction with similar fact-finding determinations required by the decisions in the two *Democratic Central Committee* cases, which will now be discussed.

B. *Democratic Central Committee–I*

DCC-I[34] also requires the Commission to make determinations of the increase in value of certain of Transit's real estate holdings while they were in utility service, but for an entirely different purpose than does *Bebchick-II.* In this case the Court found flawed the Commission's failure to look to in-service appreciation in value of properties as an offset to the increased revenue requirement found on January 26, 1968, in our fare Order No. 773[35], an order otherwise upheld.[36]

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[30] *Supra,* n.26.

[31] *Bebchick-II, supra,* n.1(c) at 876. The full treatment of the matter is found at *supra,* n.1(c) at 868-76, 880.

[32] *Bebchick-II, supra,* n.1(c) at 875-6. There is a dispute whether the entire $1,058,856 in depreciation reserve deficiency may be offset by these "gains" or only $252,688. This issue is discussed and a finding is entered, *infra,* at Part VII of this report.

[33] See *Bebchick-II, supra,* n.1(c) at 876, n.139.

[34] *Supra,* n.1(a).

[35] *D.C. Transit System, Inc.,* 72 P.U.R.3d 113 (WMATC 1968). This was the final order in Docket No. 156.

[36] *Powell v. WMATC, supra,* n.1(f). Also see *DCC-I, supra,* n.1(a) at 788, 790 n.16, and 827 n.388.

Hearing Officer Decision

In *DCC-I* the Court held ". . . that the farepayers were entitled to all appreciations in the value of the assets in issue, depreciable and nondepreciable, accruing during their tenure as operating properties",[37] and decreed that restitution be made to the farepayers of the amount of appreciation.[38] As in *Bebchick-II* the Court held that the right to in-service value appreciation matured and is to be measured as of ". . . the time the assets are removed from operating status . . . ."[39] and the appreciation or gain to be awarded to the farepayers is ". . . a net figure . . ."[40]

The Court was explicit in suggesting the techniques to be used by the Commission in determining the amount of restitution:

> This determination will require identification of all properties which Transit shifted from above to below the line prior to issuance of Order No. 773.[41] Once identified the market value of the properties at the time of their transfer to nonoperating status will have to be established. The dollar amount of restitution can then be arrived at by subtracting the book value of the properties

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[37] *Supra,* n.1(a) at 822.

[38] *Ibid.* at 824-26. Delivery to the farepayers of the benefit of their entitlement to appreciation could not be made by reduced fares or in fare proceedings because Transit ceased operations in January 1973, when its utility assets (but not its liabilities) were taken over by Washington Metropolitan Area Transit Authority (WMATA).

[39] See *supra,* n.1(a) at 822, n.343.

[40] *Ibid.* "The amount which should be credited to the farepayers is not the entire difference between book value and market value of the assets at the time of transfer, but rather that sum minus the taxes and sale expenses which would have been deducted from Transit's profits if the assets had been sold outright instead of simply being moved into nonoperating status."

[41] Order No. 773's finality was suspended by the filing of petitions for reconsideration which were denied on February 26, 1968, by Order No. 781. No property transfer occurred during this period.

from the market value at the time of transfer. This figure will represent the appreciation in value of the assets, which should have been credited to the riders when the fares prescribed by Order No. 773 were set.[42]

C. *Democratic Central Committee – II*

DCC-II[43] was the appeal of our fare Order No. 1052[44] the Commission's final order in Docket No. 216. In *DCC-II* the Court determined the entitlement as between Transit and its farepayers to the appreciation in the value of landholdings while in utility service, again concluding that the farepayers were entitled to have the amount of appreciation offset against the revenue requirement established in Docket No. 216. This case involves only appreciation in the value of land, and not buildings.[45]

Again, the restitutional remedy is directed, the measure of restitution to the farepayers being ". . . the amount by which the company's lands increased in value up to the time they were removed from operating status."[46]

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[42] *Supra,* n.1(a) at 827. This statement is presumably qualified by n.343, *supra,* n.39.

[43] *Supra,* n.1(e).

[44] *D.C. Transit System, Inc.,* 85 P.U.R.3d 1 (WMATC 1970).

[45] The property appreciation issue is dealt with generally in Part II of the Court's opinion. *Supra,* n.1(e) at 895-903 and 913-15. The land-limitation point is made specifically at *supra,* n.1(e) at 895 n.74. In *DCC-I* appreciation in value of both land and buildings is involved. In *Bebchick-II* only the appreciation in value of buildings (depreciable property) is involved.

[46] *Supra,* n.1(e) at 913. The size of the award in this proceeding may be limited by exhaustion of part of the gain in satisfying the requirement of *DCC-I* (see *supra,* n.1(e) at 897, text following n.84) and the gain is presumed to be measurable net of taxes and sales expenses as in *Bebchick-II* and *DCC-I,* although this requirement is not explicitly imposed by the Court's opinion.

III. *The Properties*

A. *Identification*

The first task was to identify the properties. I find that there are eighteen separate properties to consider.[47]

The parties for their own purposes have grouped the properties into categories, each with common characteristics relating to the issues as seen by the parties. I do not subscribe to any of these systematic groupings. There are different ways to look at each of the remanded cases individually and at the three cases as they have been consolidated for these hearings. I found that aggregation of the properties tended to impose a unitary view of the matter that obscured the importance of other perceptions. In this report, issues that apply to all properties are treated as a single issue (*e.g.*, book value); two or more properties are grouped for discussion when an issue applies equally to them (*e.g., de facto* transfer); certain issues (*e.g.*, fair market value) can be addressed only on a property-by-property basis.

It is useful to keep in mind that *Bebchick-II* involves only the depreciable portion (buildings) of six properties: Central Garage, Northeast Garage, Navy Yard Carhouse, M Street Shop, Grace Street Shop, and General Office Building. *DCC-I*, under one theory of that case, could embrace both the depreciable and nondepreciable portions of all eighteen properties, including the six properties involved in *Bebchick-II*. *DCC-II* relates only to nondepreciable property (*i.e.*, land), but, like *DCC-I*, could also involve every property, including the *Bebchick-II* properties.[48]

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[47] A generally reliable data sheet on each property is at Tr. 58-83 where the Appendix "Property Histories" to staff witness Loconto's testimony has been printed.

[48] The properties in the *Democratic Central Committee* cases are identified and the order of application of the gain is established, *infra*, at Part VIII of this report.

Six properties as to which restitution may apply were identified in this proceeding for the first time.[49] Their transfer out of operating status during the relevant time period was ascertained by the staff's witness, Mr. Loconto, of Touche, Ross & Company. These properties are in addition to the twelve properties mentioned in the appendix to *DCC-I*.[50]

In *Bebchick-II*, the Court seems to have accepted the protestants' contentions as to which properties may be looked to as sources for value appreciation to be used to offset the depreciation deficiency.[51] As to *DCC-I* it is Transit's contention that we may not look beyond the twelve properties identified in the appendix to the Court's decision in calculating the restitution due the farepayers. I find to the contrary. In *DCC-I* the Court has directed that the farepayers shall receive restitution measured by the net gain on all properties transferred out of operating status prior to the effective date of Order No. 773, January 26, 1968.[52]In *DCC-II* restitution is available from the net gain on the land portion (not the buildings) of all properties transferred out of operating status prior to the effective date of Order No. 1052, June 26, 1970, subject to its exhaustion in satisfying the restitution requirement of *DCC-I*.[53]

There is no dispute, however, that these six "newly discovered" properties were all removed from operating status and booked below-the-line during the relevant period between August 15, 1956, when Transit's franchise

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[49] Maryland Line Right-of-Way ; Benning Line Right-of-Way; Cabin John Line Right-of-Way; Substation 14th and V Streets, N. W.; Storage Yard, 13th and D Streets, N. E.; Parking lot, 36th and M Streets, N. W.

[50] *Supra*, n.1(a) at 829-31.

[51] *Supra*, n.1(c) at 869, n.85, 86 and 875-76.

[52] *Supra*, n.1(a) at 827.

[53] *Supra*, n.1(e) at 914.

commenced, and January 26, 1968, the effective date of Order No. 773.

In addition to the six properties first identified in this proceeding, Transit disputes the propriety of affording restitution to the farepayers from four of the twelve properties identified in the appendix to *DCC-I*.[54] In the interest of a complete record, I have entered findings as to all eighteen properties.[55]

B. *The Statue of Limitations*

Transit contends that a statute of limitations[56] limits our consideration to properties transferred out of service within the three years preceding the issuance of the order appealed from in each remanded case. In other words, since Order No. 773 was issued on January 26, 1968, only properties transferred out of service between January 26, 1965, and January 26, 1968, are involved in *DCC-I*; likewise, only properties transferred between June 26, 1967, and June 26, 1970 (the date of Order No. 1052) would be involved in *DCC-II*. As to *Bebchick-II*, it is Transit's contention that the three-year limitation runs either from August 15, 1963 (the date as of which the depreciation deficiency was determined) or the three years prior to January 26, 1966 when Order No. 564 was issued.

This point was discussed and decided adversely to Transit by the Commission in Order Nos. 1355[57] and

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[54] 4th Street Shop, Southern Carhouse, Brookland Garage, and Eastern Garage.

[55] I have found all eighteen properties to be available as sources of restitution, see specifically Part V p. 33 as to 4th Street Shop and Southern Carhouse, and p. 54 as to the Brookland and Eastern Garages.

[56] Presumable the three year, general statute at 12-301(8) D.C. Code, 1973 Ed.

[57] (WMATC, unreported) October 10, 1974.

1356.[58] If that determination is reversed, I find that the following properties are involved in the several cases:

Bebchick-II. A. If a three-year limitation from August 15, 1963, is found to exist:

M Street Shop
Navy Yard Carhouse

B. If a three-year limitation from January 26, 1966, is found to exist:

M Street Shop
Navy Yard Carhouse
Grace Street Shop
General Office Building

DCC-I. If a three-year limitation from January 26, 1968, is found to exist:

Brookland Garage
Eastern Garage
Trinidad Garage

provided that a date of transfer of September 11, 1966, is found for these properties. If the Brookland and Eastern garages are found not to have been transferred, and a date of transfer of July 3, 1967,[59] is found for the Trinidad Garage, then only the Trinidad Garage is involved in *DCC-I*. If a date of transfer of May 8, 1970,[60] is found for the Trinidad Garage, then there are no transferred properties from

[58] *Supra*, n.6.
[59] See discussion of Trinidad Garage at Part V, infra.
[60] *Ibid*. n.59.

which the farepayers are entitled to in-service appreciation in value in *DCC-I*.

DCC-II. If a three-year limitation from June 26, 1970, is found:

Trinidad Garage

provided that a date of transfer of May 8, 1970, is found for the Trinidad Garage.[61]

IV. *Unrecovered Investment*

The Court has told us to measure the gain to be credited the farepayers ". . . by subtracting the book value of the properties from the market value at the time of transfer",[62] and from this gross gain to deduct the taxes and sales expenses that would have been incurred if the properties had actually been sold.[63] The Court's opinions have established once and for all the entitlement to the appreciation in value of these properties, concluding that this gain shall flow to the farepayers. While the appreciation in the value of the investment in these properties can be (and has been) awarded to the farepayers, the Court's opinion does not purport to grant them any portion of the unrecovered investment in these properties. This, the investors are entitled to retain.

The Court's language, quoted above, suggests the conclusion that the measure of the unrecovered investment is book value. But this point was not conceded, and the issue of the proper measure of unrecovered investment became the most hotly contested in these proceedings.

The parties generally agreed that the approach to derivation of unrecovered investment should be the same for every property. This is not to say that the parties

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[61] *Ibid*.

[62] *Supra*, n.1(a) at 827.

[63] *Ibid*. at 822, n.343.

agree on the method of calculation—far from it—only that whatever method is adopted must be uniformly applied to all properties. Therefore, I shall identify and discuss the contending theories in this section of the report and reach a decision as to which is applicable. Unrecovered investment for each property will then be determined in accordance with that decision. The issues to be disposed of in this effort are:

1. Is the starting point for the computation of original investment the market value as of August 15, 1956, when Transit acquired the properties?

2. If market value, how is market value to be ascertained?

3. If not market value, should original investment be measured by the "compromise" rate base?

4. If not market value, or a value calculated from the "compromise" rate base, should original investment be measured by book value on August 15, 1956?

5. What treatment is to be accorded to in-service Acquisition Adjustment amortization accruals and unamortized Acquisition Adjustment balances relating to individual properties?

In general I have accepted the theories of the staff and the intervenors on these issues and rejected Transit's.

1. I find unrecovered investment to be rooted in book value and not market value. Transit would have the gain on each property calculated by subtracting the *market value* as of August 15, 1956 (adjusted for subsequent depreciation and amortization of the Acquisition Adjustment[64]) from the market value as of the date of transfer. This is the so-called "benefit of the bargain" theory.[65] D.C. Transit's purchase of the stock of Capital

[64] The Acquisition Adjustment is discussed later.

[65] Elucidated by counsel for Transit at Tr. 1003.

Transit in 1956 was a bargain purchase, *i.e.*, the price paid was below the market value of the underlying assets, particularly the real property.[66] The Court makes reference to this fact in its discussion of entitlement to the value appreciation of the properties[67] and cites it as a factor in its decision to award the value appreciation to the farepayers.[68]

Transit's argument is couched in equitable terms and in the final analysis is addressed to the conscience of the tribunal. At its core is the plea that it is ultimately unfair to use the bargain purchase as a principal prop for the conclusion that the farepayers should enjoy the increase in value of these properties and then to measure this increase in a way which strips away the bargain, as measuring it from a value that is not derived from date-of-purchase market value undeniably does.[69]

The Commission does not have equitable powers, however, and so we cannot respond to Transit's plea—especially in view of the Court's explicit instructions to us on how to compute value appreciation. In order that the point may be preserved for the Court, I have entered findings on market value as of August 15, 1956.[70]

In any case, this jurisdiction has long since adopted an original-cost approach to regulation in which investor

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[66] *Supra*, n.1(a) at 814–15.

[67] *Ibid.* at 815 n.264.

[68] *Ibid.* at 822 and n.340.

[69] The argument has a semantic appeal as well. For example, at places in its opinions such as, in *DCC-I, supra*, n.1(a) at 822 (text at n.334) the Court speaks of the farepayers' entitlement to "appreciation in market value", which many would construe to mean the increase computed by subtracting the market value at one time from market value at another time. But regardless of the interpretation that linguistic analysis may permit of a random phrase, there is little ambiguity in the opinions taken as a whole or in the Court's instructions to us on how to measure "gain", see *DCC-I ibid.* at 827.

[70] See Appendix A.

costs are equated with book value and not market value. In every instance during the years that Transit was regulated by the Public Utilities Commission and by this Commission, the original investment in each property has been equated to a *pro rata* share of the purchase price, the proration being on the basis of historical booked costs as of August 15, 1956.[71] To vary that approach now would only introduce further complexities in this proceeding and produce distortions that would have to be resolved—heaven forbid, by the Court of Appeals!

If Transit's benefit-of-the-bargain theory were to be accepted, it would reduce almost to nil the gain to be awarded to the farepayers.[72] Transit's first-filed exhibits in this case were based on the theory that the point of beginning was market value on the date of acquisition.[73] I conclude that computation of appreciation on date of transfer is to be calculated from a date-of-transfer unrecovered investment derived from the August 15, 1956, book value, not the August 15, 1956, market value.

2. It should be noted that Transit's Exhibits 15 to 28 calculated August 15, 1956, market values on an "assessed-value-ratio" basis.[74] If the decision is finally

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[71] This is not to say that some other allocation of purchase price to assets might not have been made as, for example, by proration in accordance with relative market values as of the date of acquisition, or in accordance with net book values on that date.

[72] To illustrate: date-of-transfer market values aggregate $9,835,055 per my findings, *infra*. Subtracting the August 15, 1956, aggregate appraised market values of $7,741,355 per Appendix A leaves a gross gain of $2,093,700 according to my own findings in which unrecovered investment is equated with net book value.

[73] This theory was rejected, and the exhibits calculating gain on that basis were not admitted into evidence. Tr. 937–1036, especially 986–1029.

[74] That is, market values were calculated as a percentage of assessed value. Transit assumed that assessed values represent 65 percent of market value.

[75] These values are set out in Appendix A of this report.

made that August 15, 1956, market values are the proper basis from which to determine original investment, I find that the market values on that date are the appraised values that appear in Staff Exhibits 2-20, which were admitted as rebuttal to Transit's evidence of market value.[75]

3. After the ruling that date-of-acquisition market values would not be considered as evidence of original investment, Transit presented an alternative theory, namely, equating original investment with valuations based on the "compromise" rate base. Transit filed additional testimony (Tr. 1262 *et seq.*) and exhibits (Transit Exhibits 35 to 44) allocating the "compromise" rate base to the several properties.[76]

The "compromise" rate base was a creature of the D.C. Public Utilities Commission, who regulated Transit until this Commission assumed jurisdiction in 1961. The "compromise" rate base first saw light in 1957 in P.U.C. No. 3592[77]certifying Transit's eligibility for gasoline tax exemption.[78]

The valuation of this rate base, $13,020,500, was halfway between the value of Transit's assets per its books, $17,910,000, and the cost to investors of its assets, $8,131,000, as found by the P.U.C. Of course, the higher the valuation of the rate base the greater the revenue requirement under the rate-base/rate-of-return method of regulation, and the more dollars are needed to achieve

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[76] These exhibits were admitted into evidence because the "compromise" rate base may be characterized as a "book value" and, hence, arguably within the meaning of the language of *DCC-I, supra,* n.1(a) at 827, directing that book value at date of transfer be determined.

[77] (D.C.P.U.C., unreported) November 27, 1957.

[78] The Transit Franchise Act, *supra*, n.16 at Section 4 provided for exemption of the company from certain District of Columbia taxes if it did not earn its authorized rate of return.

[79] *Ibid.* Section 6.

authorized earnings. P.U.C., by adopting the "compromise" rate base, was, in effect, liberalizing the regulatory treatment of the company as contemplated by the franchise act,[79] by measuring earnings against a more generous standard than conventional rate base regulation would have accorded. In Order No. 4480[80] the "compromise" rate base was used in a fare case for the first time.[81] The applicability of the "compromise" rate base as a regulatory instrument is discussed exhaustively in *D.C. Transit v. WMATC.*[82]

The question posed is whether the unrecovered investment as measured by "net book costs"[83] must or may be calculated using the "compromise" rate base, as it would have been on August 15, 1956, as the starting point.[84] I conclude that we are neither required, nor even authorized, by anything in the Court's opinions to do so. An "investment" that bears no relationship to actual cost will not do. The "compromise" rate base is not representative of cost any more than market value.

As the next section demonstrates, net book value at date of transfer is the best measure of unrecovered in-

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[80] *D.C. Transit System, Inc.*, 25 P.U.R.3d 371 (D.C. P.U.C. 1958).

[81] This was the only time it was the exclusive regulatory tool. Later, P.U.C. moved to the operating ratio method of regulation [see *D.C. Transit System, Inc.*, 33 P.U.R.3d 137 (D.C. P.U.C. 1960) and *D.C. Transit System Inc.*, 38 P.U.R.3d 19 (D.C. P.U.C. 1961)] with the return on the "compromise" rate base used as a check after the decision in *Bebchick v. P.U.C., supra.* n.21.

[82] *D.C. Transit System, Inc., v. Washington Metropolitan Area Transit Commission,* 121 U.S.App.D.C. 375, 350 F.2d 753 (*en banc* 1965).

[83] *DCC-I, supra,* n.1(a) at 827.

[84] It bears mention that no regulatory agency has ever allocated Transit's rate base—be it original cost, "compromise", or purchase price—to individual properties, or, for that matter, even to classes of property except for depreciation purposes. Thus the use of a book-value rate base, of whatever kind, requires an allocation of a gross book figure to the properties involved in the case, an exercise that is judgmental or "arbitrary".

vestment among the various approaches suggested by the parties to capture that concept.[85] While in *D.C. Transit v. WMATC*[86] the Court accepted the "compromise" rate base for ratemaking and tax-certification purposes, that case cannot be construed as a ratification of that rate base as representative of investment in a specific property at any particular time. The Commission must look to the opinions on remand for the Court's views on how to determine unrecovered investment. Despite the eloquence of Transit's counsel (Tr.1454-6) I find no basis in any opinion to conclude that the Court has found that as of the date of transfer Transit's investors had a right to retain any more than their remaining investment in these properties, as they would surely do if investment were equated with an allocation of the "compromise" rate base. While thoroughly disagreeing with Transit on this point, I have nevertheless entered findings (see Appendix B) on unrecovered investment per the "compromise" rate base theory.

Appendix B is the best illustration of the folly of the compromise-rate-base approach to a determination of unrecovered investment. The problem arises because of the arbitrary nature of the allocation process used by Transit to apportion the "compromise" rate base to the individual properties. The "compromise" rate base, it will be remembered, is half-way between the August 15, 1956 net book value on the basis of depreciated original cost and the actual purchase price. Transit's purchase price was, in round numbers, $13.5 million for a corporation with net assets of $23.8 million or about 56¾ percent of net book value. On that basis—which Transit may have feared would be adopted in this proceeding—each property, land and buildings, could have been as-

[85] Subject to the infirmity that any method requires an allocation among properties and property classes.

[86] *Supra*, n.82.

cribed an original investment value of 56¾ percent of net book value. This would have produced an aggregate original investment value for all the properties of $1,666,436 (56¾ percent of the net book value of $2,938,005 on the date of acquisition).

Transit chose to calculate the "compromise" rate base investment in another way, one which allocated the excess of the "compromise" rate base over actual purchase price entirely to depreciable property in proportion to its original cost and not its net book value as of the date of acquisition. This technique inflates the presumed original investment in the properties involved in this proceeding by $148,389 to $1,814,825.

4. The only other "cost" offered in evidence was related to book value, and to that I now turn. I have concluded that the proper measure of the investor's remaining unrecovered investment in any property at its date of transfer is the net value on the company's regulatory books of account on that date. This is not to say that I am totally enthusiastic about this, as it, no less than any other method that requires an allocation, is oracular. It is, however, constitutionally defensible and less unacceptable than the other indices recommended by Transit[87] or which have occured to me.[88]

While parties do not all agree that net book value on the date of transfer is the proper measure of unrecovered investment, there is agreement on how to calculate it. There is agreement on the net book value of each property on the date of acquisition. Similarly, there is no

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[87] Market value based on assessed value ratios, or the "compromise" rate base. The case would have been more interesting if Transit could have shown that, in fact, the value of the company was in its real property and their motive in purchasing the company was to exploit those assets, with a resultant subjective allocation of the purchase price to real properties in some closer relationship to market value.

[88] Tax basis, for example.

dispute that improvements between the date of acquisition and the date of transfer constitute additional investments. There is agreement, except in one instance,[89] on the investment in improvements. There is agreement that depreciation accruals between the date of acquisition and the date of transfer represent a recovery of investment and should be deducted from net book value at date of acquistion to ascertain the remaining unrecovered investment at date of transfer. There is agreement on the amount of these depreciation accruals. There is agreement on the dates of transfer except for Brookland, Eastern and Trinidad garages, to which Transit excepts.[90] These essentially undisputed concepts and data simply reflect the truism that at any given time the remaining dollar investment in an item of utility property is the net book value, that is, original cost less accrued depreciation to date. And so, I find, it is for Transit.

There would be no room to dispute this finding if there had been continuity of ownership in these assets throughout their lives as utility property. But Transit acquired an operating utility system at a price that bore no relationship to the then unrecovered investment residual in its assets, thereby opening the issue of how to allocate the purchase price among the assets. The market-value approach and the compromise-rate-base alternative are no more than attempts by Transit to achieve a favorable allocation in this proceeding. As compared with an allocation based on net book value at date of acquisition I have found Transit's alternatives wanting. In any event I conclude that the Court decided the allocation issue, requiring that it be based on net book value.

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[89] The General Office Building. This is discussed and decided, *infra,* Part V p.49.

[90] This is discussed *infra,* Part V p.54.

On the basis of the foregoing, I have made findings as to the unrecovered investment in each property as of its date of transfer. Those findings are set out in Table I which appears at the end of this section of the report.

5. One final matter requires discussion: the Acquisition Adjustment. The Acquisition Adjustment is a familiar creature to the coterie of Transit regulation cognoscenti. The net book value of the company's assets (original cost less accrued depreciation) when acquired by Transit in August 1956 was $26,631,874. The purchase price was $16,292,833 consisting of cash consideration of $13,478,000 and assumption of $2,814,833 in liabilities. The difference was $10,339,041. Following conventional regulatory accounting practices the P.U.C. set up an "Acquisition Adjustment Account" of $10,339,041 as a noncurrent liability to be amortized over 10 years by offsets against depreciation expense (which was based on original cost) in order, as the P.U.C. stated, ". . . that the allowance for depreciation should be based on the purchase price. . . ."[91] The schedule for amortization of the Acquistion Adjustment was later modified by this Commission (Order No. 563),[92] with the approval of the Court in *Williams v. WMATC.*[93] P.U.C. never allocated the Acquisition Adjustment to Transit's assets, and it continued to be amortized as a single charge, offsetting depreciation expense. By the time of Transit's acquistion by WMATA in 1973 it had been entirely amortized except for $168,000 (see Schedule 6 to Mr. Loconto's testimony Tr. 35–39, and 50).

When the several properties involved in these cases were transferred out of service there was an unamortized balance in the Acquistion Adjustment account. Arguably

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[91] *Supra,* n.77 at 9.

[92] *D.C. Transit System, Inc.,* 63 P.U.R.3d 32 (WMATC, 1966).

[93] *Supra,* n.14.

some portion of this balance was allocable to each of those properties. After a property was taken out of service, no further charges to farepayers for depreciation on that property were made. But the offset for the amortization of the Acquisition Adjustment account *in toto* did continue, because the Acquisition Adjustment was never allocated to individual properties. Thus, the farepayers continued to receive the benefit of the total offset to depreciation charges even though depreciation expense was less because the depreciable base in real estate to which the offset was in part related (*i.e.*, the properties acquired in 1956) was declining. As noted by Mr. Loconto (Tr. 96) the farepayers received, for all practical purposes, the entire benefit of the Acquisition Adjustment.

This bears directly on the actuality of the recovery by the investors of their investment as was illustrated by Mr. Bebchick at the hearing on June 2, 1977.[94] In a perfect world when a property went out of service, not only would its original booked cost and accrued depreciation be moved "below the line", but so would an allocable portion of the Acquisiton Adjustment account. Otherwise the allocable portion of the Acquisition Adjustment would continue to be credited as an offset to depreciation expense, to the benefit of the farepayers, as in fact happened. This is what Transit's witness Hatfield meant by insisting that the related Acquistion Adjustment must "follow the property below the line" (Tr. 1259). I agree with Mr. Hatfield that this is so. But I cannot agree with his apportionment of the Acquisition Adjustment among the properties nor the increments to unrecovered cost that would result from his method of compensation for the failure to reduce the Acquisition Adjustment when a property was transferred below the line.

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[94] Tr. 1484–1506, especially 1487 line 2, to 1493 line 11, and 1494 line 22, to 1495 line 20.

Mr. Hatfield allocated the Acquisition Adjustment *pro rata* on the basis of original cost of the depreciable property. This produced anomalies such as an allocation of $52,128 to the Trinidad Garage which was fully depreciated on the date of acquisition and therefore generated no depreciation expense against which to amortize the Acquisition Adjustment. To allocate a portion of the Acquisition Adjustment to this property is not only illogical, but is at variance with the practice of the Commission in amortizing the Acquisition Adjustment against depreciation expense. It has the anomalous result that in a fully depreciated property like Trinidad there can be no amortization of the allocable Acquisition Adjustment because there is no depreciation on that property against which to offset it.[95]

In any event, in *Williams,*[96] the only time the Court has spoken to the allocation of the Acquisition Adjustment, it was determined that it must be related to depreciation dollars. That decision, even if not binding, is eminently logical. If I were to allocate the Acquisition Adjustment I would do it on that basis, and allocate the unamortized balance property-by-property as of the date of transfer against the then net book cost of the depreciable property. However, I also accept Mr. Loconto's view that the inequities that flow from the failure to reduce the balance in the Acquisition Adjustment account whenever a property went out of service do not work a substantial injustice.[97] Therefore, in arriving at the figure

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[95] Moreover, in Mr. Hatfield's schedules Acquisition Adjustment-related increments to investment are bound up inextricably with the increments to net book value brought about by his use of the "compromise" rate base as a surrogate for investment. It was not necessary for me to extricate the increments from Mr. Hatfield's schedules (Transit Exhibits 40, 41). I have not attempted it, nor asked Transit to do so, for the reasons in the text.

[96] *Supra,* n.14.

[97] Tr. 1494–95, and 1501.

establishing the unrecovered investment in each property at date of transfer I have ignored the Acquisiton Adjustment and calculated it on the basis of original cost less accrued depreciation at date of transfer. As Mr. Bebchick demonstrated[98] this approach produces virtually the same result as would flow from a properly conducted[99] allocation of the Amortization Adjustment to the properties, combined with recognition of the unamortized balance of the Acquisition Adjustment account allocable to a given property at its date of transfer as an element that would diminish the investor's recovery of their investment.

In short, both Mr. Loconto and Mr. Hatfield recognized the dynamics of the situation and tried to deal with it. Mr. Hatfield's method required vast recalculation efforts and rested on an unacceptable allocation formula. Mr. Loconto's method reconciles history with the award of "gain" to the farepayers in these proceedings—a "real world" solution. If, in fact, these "gains" had been awarded to the farepayers at the time the properties went out of service, or in 1968 or 1970 in connection with the orders under remand, it would have been appropriate to make an allocation of the Acquisition Adjustment account and move the unamortized balance related to the property below the line, or otherwise take account of its effect to reduce the recovery of investment.

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[98] *Ibid.*

[99] *I.e.*, in proportion to undepreciated original cost of depreciable property at date of acquisition.

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Hearing Officer Decision

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Table I

UNRECOVERED INVESTMENT

(1) Property	(2) Original Cost Per Books 08/15/56	(3) Depreciation Reserve 08/15/56	(4) Net Book Value 08/15/56 Col(2) minus Col(3)
Central Garage			
Land	$ 19,315	–	$ 19,315
Bldg	427,778	$192,881	234,897
Total	447,093	192,881	254,212
Fourth Street Shops			
Land	48,912	–	48,912
Bldg	795,399	395,279	400,120
Total	844,311	395,279	449,032
Southern Carhouse			
Land	40,177	–	40,177
Bldg	243,347	120,933	122,414
Total	283,524	120,933	162,591
Maryland Line Right-of-Way	4,301	–	4,301
Benning Line Right-of-Way	974	–	974
Northeast Carhouse			
Land	36,151	–	36,151
Bldg	124,438	49,281	75,157
Total	160,589	49,281	111,308
Cabin John Right-of-Way	96,237	–	96,237
Georgia and Eastern Terminal			
Land	31,199	–	31,199
Bldg	20,399	6,134	14,265
Total	51,598	6,134	45,464
14th and V Streets Substation			
Land	9,038	–	9,038
Bldg	16,835	13,643	3,192
Total	25,873	13,643	12,230
13th and D Streets Storage Yard	976	–	976
Navy Yard Carhouse			
Land	106,562	–	106,562
Bldg	245,776	198,088	47,688
Total	352,338	198,088	154,250
M Street Shop			
Land	65,793	–	65,793
Bldg	281,035	222,651	58,384
Total	346,828	222,651	124,177

(5) Improvements (Retirements) 08/15/56 to Date of Transfer	(6) Depreciation 08/15/56 to Date of Transfer	(7) Original Cost Per Books: Date of Transfer Col(2) plus Col(5)	(8) Depreciation Reserve Date of Transfer Col(3) plus Col(6)	(9) "Unrecovered Cost" Net Book Value Date of Transfer Col(7) minus Col(8)
–	–	$ 19,315	–	$ 19,315
–	$ 22,725	427,778	$ 215,606	212,172
–	22,725	447,093	215,606	231,487
–	–	48,912	–	48,912
$ 1,590	47,321	796,989	442,600	354,389
1,590	47,321	845,901	442,600	403,301
–	–	40,177	–	40,177
752	12,204	244,099	133,137	110,962
752	12,204	284,276	133,137	151,139
–	–	4,301	–	4,301
–	–	974	–	974
–	–	36,151	–	36,151
–	8,685	124,438	57,966	66,472
–	8,685	160,589	57,966	102,623
–	–	96,237	–	96,237
–	–	31,199	–	31,199
–	8,279	20,399	14,413	5,986
–	8,279	51,598	14,413	37,185
–	–	9,038	–	9,038
–	2,718	16,835	16,361	474
–	2,718	25,873	16,361	9,512
–	–	976	–	976
–	–	106,562	–	106,562
–	42,243	245,776	240,331	5,445
–	42,243	352,338	240,331	112,007
–	–	65,793	–	65,793
–	48,303	281,035	270,954	10,081
–	48,303	346,828	270,954	75,874

Table I

UNRECOVERED INVESTMENT – (Continued)

(1) Property	(2) Original Cost Per Books 08/15/56	(3) Depreciation Reserve 08/15/56	(4) Net Book Value 08/15/56 Col(2) minus Col(3)
Grace Street Shop			
Land	$ 11,294	–	$ 11,294
Bldg	152,703	$ 104,596	48,107
Total	163,997	104,596	59,401
General Office Building			
Land	44,127	–	44,127
Bldg	839,071	504,463	334,608
Total	883,198	504,463	378,735
Parking Lot	579	–	579
Brookland Garage			
Land	103,659	–	103,659
Bldg	393,007	289,147	103,860
Total	496,666	289,147	207,519
Eastern Garage			
Land	74,867	–	74,867
Bldg	334,387	246,588	87,799
Total	409,254	246,588	162,666
Trinidad Garage			
Land	40,733	–	40,733
Bldg	234,557	234,557	–
Total	275,290	234,557	40,733
GRAND TOTAL	$4,843,626	$2,578,241	$2,265,385

(5) Improvements (Retirements) 08/15/56 to Date of Transfer	(6) Depreciation 08/15/56 to Date of Transfer	(7) Original Cost Per Books: Date of Transfer Col(2) plus Col(5)	(8) Depreciation Reserve Date of Transfer Col(3) plus Col(6)	(9) "Unrecovered Cost" Net Book Value Date of Transfer Col(7) minus Col(8)
–	–	$ 11,294	–	$ 11,294
–	$ 27,201	152,703	$ 131,797	20,906
–	27,201	163,997	131,797	32,200
–	–	44,127	–	44,127
$673,024	212,357	1,512,095	716,820	795,275
673,024	212,357	1,556,222	716,820	839,402
–	–	579	–	579
–	–	103,659	–	103,659
4,967	108,827	397,974	397,974	–0–
4,967	108,827	501,633	397,974	103,659
–	–	74,867	–	74,867
(7,747)	80,052	326,640	326,640	–0–
(7,747)	80,052	401,507	326,640	74,867
–	–	40,733	–	40,733
–	–	234,557	234,557	–0–
–	–	275,290	234,557	40,733
$672,586	$ 620,915	$5,516,212	$3,199,156	$2,317,056

V. *Market Values at Date of Transfer*

The gross gain in value to be recognized for any property is the difference between the market value of the property and the unrecovered investment on the day the property was taken out of utility service.[100]

In determining unrecovered investment the issue was allocation of the purchase price. The choice was between several methods of allocation. The choice having been made, the method was applied uniformly to every property. In determining market values of eighteen unique properties, the choice was not among methods of valuation in an effort to find the one applicable to all the properties. Rather, it was to select the most appropriate method for each property. This is not to say that a common method could not be used for determining date-of-transfer market value. Indeed, Transit has suggested that the assessed-value-ratio[101] method is, if not required,[102] at least an option.

If assessed values were the only market value evidence in this record, they would be accepted and a uniform approach to valuation would be the result. However, the staff presented copious appraisal testimony by Mr. William S. Harps, a real estate appraiser

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[100] *DCC-I, supra,* n.1(a) at 827; *Bebchick-II, supra,* n.1(c) at 875; *DCC-II, supra,* n.1(e) at 914.

[101] Under the assessed-value-ratio method, market value is obtained by dividing the assessed value (for purposes of real estate taxation) of the property at a given time by the stated ratio of assessed value to market value. For example, if assessed value of a property is $65,000 and assessed values are said to be calculated at 65 percent of market value then market value of $100,000 would be assumed ($65,000 ÷ .65).

[102] The assertion that this approach to market valuation is required is rejected in Part IV, supra. See *Bebchick-II,* supra, n.1(c) at n. 137. In the event that it is determined that assessed-value ratios must be used to determine date-of-transfer market values, I have made supplemental findings as to those values. They appear in Appendix C.

of recognized stature[103] who is familiar with Transit's real estate holdings.[104] I find his testimony and supporting exhibits to be more credible evidence of date-of-transfer market values than extrapolated assessed values.

An inherent weakness in Mr. Harps' appraisals lies in the fact that they were necessarily made years after the dates as of which they speak.[105] It is possible that appraisals made at the actual dates of transfer by Mr. Harps would have produced different estimates of value.[106] This defect is by no means as severe, however, as the weaknesses of calculating market values from real estate tax assessments, which are not made with close attention to every property, which are not revised regularly or often, where the ratio of assessment to value must be assumed and may differ between land and buildings, and so on. Mr. Harps pointed out some of the deficiencies in the assessed-value method (Tr. 356). Moreover, there was a suggestion that utility property especially was treated casually by the assessor's office (Tr. 576) a fact that further undermines the reliability assessed values as evidence of market values.

One general point must be made about Mr. Harps' testimony, which is found in some 20-odd exhibits. Most were appraisals, reappraisals, or revisions in appraisals of specific properties. Staff Exhibit 1, however, was a narrative volume describing Mr. Harps' approach to appraisal of the several parcels involved. In some cases

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[103] See qualifications, Staff Exhibit 1, pp. iii, iv.

[104] Tr. 361.

[105] Appraisals were not made in connection with the transfers of properties out of utility service.

[106] Two more contemporaneous appraisals were used to test Mr. Harps on cross-examination. Their conclusions were different from his, but there is no consistent pattern of difference suggesting that contemporaneity rather than judgment is the source of difference.

(Grace Street Shop, Navy Yard Carhouse) he relied in his specific appraisal report on an approach to valuation different from the one indicated in his narrative report.[107]

Generally speaking there are three principal approaches to valuation used by real estate appraisers: the cost approach, the market data approach, and the income approach. When possible, an estimate of value using each approach is developed by the appraiser and the valuations reached are reconciled judgmentally in reaching the appraiser's final estimate of value. This reconciliation requires consideration of the reliability and completeness of data, and the applicability of the approach used to the type property involved.

The cost approach involves an estimation of the value of land as if vacant, and an estimate of the cost to replace the improvements, from which is deducted the physical, functional and economic depreciation or obsolescence of the property at the appraisal date.

The market data approach relies upon a comparison of sales data for similar properties, with adjustments to reflect differences in order to make the data useful as a basis for valuing the property being appraised.

The income approach capitalizes the net income to be expected from a property.

One or another approach to valuation might produce a better indication of value at a given time depending on the nature of the property. For example, to determine the value in use of special purpose property such as utility property it is typical to rely most heavily on the cost approach, because of the paucity of similar properties for which market data are available, and the limited insight into value to be gained by capitalizing income flows for another use. For that reason Mr. Harps' appraisals

[107] Where this issue arose specifically it is discussed in connection with the findings on the particular property, *infra*.

as of August 1956 rely on the cost approach. The properties at that time were all devoted to utility purposes and appraised in that use, where their value is most properly equated with replacement cost.

When estimating market values under no restriction as to use, *i.e.,* after transfer from utility service, Mr. Harps' value estimates usually derived from an income approach or from a market data approach if comparable data were reasonably reliable.

In some instances Mr. Harps changed the approach to valuation between the time he wrote his original narrative report and the time he prepared the specific appraisal. He readily acknowledged this and willingly explained the reasons, which in every case I have found to be plausible.

Date-of-transfer market values and gross gain (market value less unrecovered investment at date of transfer) are summarized in Table II, following this section.

Central Garage (Georgia Avenue Estates)
2112 Georgia Avenue, N.W.

The parties agree that this property left utility service on September 30, 1958. Shortly thereafter it was rented to the U. S. Post Office as a garage. Two appraisals of this property were admitted into evidence.

Mr. Harps' appraisal (Staff Exhibit 8) was made in the Spring of 1975. He estimated the value of the land to be $322,000 and the value of the building to be $610,200 for a total of $932,200. Mr. Harps followed the income approach to valuation of this property.

Also admitted into evidence (Protestant Exhibit 2) was an appraisal dated December 1, 1958, by Mr. Thornton W. Owen. This appraisal concluded that the land was worth $293,035, which was rounded to $300,000, and that the building, based upon a cost approach to valuation, was worth $700,359, although on an income ap-

proach it would be worth $721,931. The building valuation was rounded to $700,000, to produce a total valuation of the property of $1,000,000.

Intervenor Bebchick used the Owen appraisal on cross-examination to challenge Mr. Harps' valuation. Mr. Harps, while conceding Mr. Owen's qualifications and the recognition to be accorded a more contemporaneous appraisal than his own, nevertheless declined to modify his valuation on the basis that the difference between the two appraisals, about 7 percent overall ($68,000/$1,000,000) and 13 percent on the building ($90,000/$700,000), was within the range that one might normally expect (Tr. 430-33, 440). He did indicate that he would have "no problem" if the Commission were to find this property to have a value of $1,000,000 (Tr. 442), but this concession seems to relate to his acceptance of a $1,000,000 valuation based upon a cost approach to value (Tr. 438-39).

I believe that the income approach to valuation should be preferred for this property, which was commercially desirable real estate when transferred out of service in September 1958 as is evidenced by its prompt lease to the Post Office department.

Of course, Mr. Owen's income-approach valuation was also $1,000,000. This was based upon his capitalization of the net income of $82,000 from the Post Office lease, which had already been entered into when Mr. Owen did his appraisal. Mr. Harps, on the other hand, reached his income-approach valuation by capitalization of net income of only $66,500. Mr. Harps' rental estimate was derived from comparable leases to commercial tenants, and in discussing the income approach to valuation of this property, he concluded that the rent paid by the Post Office and capitalized by Mr. Owen was "too much" (Tr. 438-39). I agree, and accept Mr. Harps' rental estimate and related building value. The

likelihood is too great that the rent capitalized by Mr. Owen, includes something for the auto repair equipment in this property and, hence, inflated Mr. Owen's valuation. Mr. Harps' valuation will be accepted as representative of the judgment of value that would have been given by an appraiser on September 30, 1958, if an appraisal had actually been made on that date.

On cross-examination by counsel for Transit, Mr. Harps agreed that market value would be reduced from $932,000 to $877,000, if a capitalization rate of 8½ percent, as used by Mr. Owen were applied rather than 8 percent, as Mr. Harps had used. I find it difficult to accept a capitalization rate of 8½ percent, which derives from Mr. Owen's use of a mortgage rate in the high range of a zone rather than the midpoint that Mr. Harps selected. To accept one element of the Owen report to vary Mr. Harps' conclusion, and not accept others which Mr. Harps also agreed were reasonable would lead to inconsistency if not error.

Accordingly, I find the market value of the Central Garage on the date of transfer, September 30, 1958, to be $932,200 of which $322,000 is attributable to the land and $610,200 to the building.

4th Street Shop And Southern Carhouse

These two Southwest Washington properties were transferred out of service on January 16, 1959, when they were purchased by the District of Columbia Redevelopment Land Agency.

1. *Res Judicata*

The first issue to be addressed is whether these properties should be considered in this proceeding at all.[108]

[108] They are involved only in the *Democratic Central* cases in any event.

Transit urges that they must be excluded on the grounds of *res judicata* and collateral estoppel. Staff and the other parties differ. This issue arises for the first time in this proceeding. Heretofore the parties and the Commission have concentrated on the issue of entitlement to value appreciation generally, without focus on specific properties.

Transit's *res judicata* argument is bottomed on the premise that entitlement to the appreciation in value of these properties has been adjudicated to finality, both administratively[109] and judicially.[110] Moreover, runs the company's argument, the estoppel doctrine bars the parties from raising in this proceeding any issue that could have been raised in the prior administrative and judicial proceedings but was not.

In its Order No. 4577[111] the Public Utilities Commission considered the allocation of the gain realized on the sale of these two properties. The P.U.C.'s order did not treat the properties individually and they will not be treated individually in this discussion since the *res judicata*/collateral estoppel point applies to both, and the matter can be better understood if continuity of arithmetic is maintained back to the original P.U.C. order.

As to these two properties, P.U.C. Order No. 4577 found the combined original cost of land to be $89,089 and of buildings to be $1,077,824.[112] Some $613,661 had been accrued to the depreciation reserve on account of depreciation allowed on these buildings over the years, leaving $464,163 in unrecovered investment on the de-

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[109] See *D.C. Transit System, Inc.* (Order No. 4577) 30 P.U.R.3d 405 (D. C. P.U.C., 1959).

[110] *D. C. Transit System, Inc. v. P.U.C.* 110 U.S.App.D.C. 241, 292 F.2d 734 (D. C., 1961).

[111] *Supra*, n.109.

[112] These figures are confirmed by my findings.

preciable buildings.[113] Proceeds of sale of $2,954,693[114] were allocated $1,039,658 to land and $1,915,035 to buildings, resulting in a gross gain as follows:

	LAND	
Proceeds		$1,039,658
Cost		89,089
Gain		$ 950,569
	BUILDINGS	
Proceeds		$1,915,035
Cost	$1,077,824	
Less accrued depreciation	613,661	
Unrecovered cost		464,163
Gain		$1,450,872

The $950,569 gain realized on the land was credited to earned surplus, where, of course, it benefited investors. This treatment was not contested at the agency level nor appealed.

As to the $1,450,872 gain over depreciated cost of the buildings, Transit sought a P.U.C. ruling that the entire amount be credited to earned surplus, where it too would benefit investors. A ruling was necessary because the treatment sought by Transit varied from that prescribed by P.U.C.'s system of accounts. Under P.U.C.'s accounting system the entire $1,450,872 would have been credited to the depreciation reserve, thereby "repaying" the farepayers not only the $613,661 in depreciation charges that they had borne, but further benefiting them to the extent of the $837,211 by which the allocable proceeds of sale exceeded the original cost of the depreciable property. The P.U.C.'s system of ac-

[113] These figures are a computation from other data. In fact, as Order No. 4577 points out, depreciation accruals had not been segregated by units or classes of property.

[114] The total sale price to RLA was $3,320,000, but $365,307 was allocated to machinery, sales expense, and severance damages.

counts, in common with most such accounting systems, contemplated a depreciation reserve such that the proceeds of a sale of property at retirement would be sufficient to offset any remaining undepreciated cost. Of course no such system works perfectly, but errors are generally fairly small in relation to the whole and tend to offset one another as some sales come in high and others low.

This sale was very unusual, producing revenues that were not only far in excess of undepreciated cost but substantially in excess of original cost. Accordingly, it merited special consideration. Transit took the conventional view that the proceeds should be allocated to the depreciation reserve only in an amount sufficient to offset the unrecovered $464,163.

P.U.C.'s decision split the $1,450,872 gain, allocating $613,661 of the proceeds to the depreciation reserve (in effect to the farepayers) and the $837,211 "profit" over original cost to earned surplus (the investors). In the final analysis this must be seen as an attempt to do equity between the farepayers and Transit's investors. As the P.U.C. pointed out, the streetcar-to-bus conversion program was sure to result in some extraordinary retirement losses, which the farepayers would bear. This sale – of streetcar-related properties – was viewed as part and parcel of the conversion program, notwithstanding that its timing was dictated by RLA's requirements and not Transit. As P.U.C. said in Order No. 4577,[115] "[h]owever, if the customers are to be required to bear the burden of extraordinary retirement losses incident to the whole conversion program, it appears equitable that they should share, at least to some extent, in extraordinary retirement gains of the nature here under consideration." P.U.C. accomplished this sharing by re-

[115] *Supra*, n.109 at 412.

turning to the farepayers the $613,661 that they had contributed over the years through depreciation, to retire the investment in the property. This decision was affirmed by the Court upon Transit's appeal.[116]

On this history, Transit claims its bar of *res judicata* and collateral estoppel to reconsideration of the disposition of the proceeds of sale of these two properties. Clearly, Transit's argument must fail as to the gain on the land, a question that was not litigated before the P.U.C. or the Court.

Proof that Transit does not really regard the appreciation-in-land issue as foreclosed by prior decisions is its failure to nominate the Georgia and Eastern Avenue Terminal as a property from which the farepayers can claim no restitution on the grounds of *res judicata* and collateral estoppel. No less than the 4th Street Shop and Southern Carhouse, this property and the proceeds of its sale have been the subject of prior litigation, both administrative and judicial. It was involved in Order No. 245,[117] *D. C. Transit v. WMATC*[118] and Order No. 563,[119] where, on remand, this Commission found that there was no gain on the depreciable portion of this property, and determined that the farepayers were not entitled to share in gain on the land. In Order No. 563 after finding that the retirement of the terminal was not related to the bus conversion program the Commission concluded:

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[116] *D. C. Transit System, Inc. v. P.U.C. supra* n.110. Only the decision to credit the $613,661 to the depreciation reserve was appealed; the decisions to credit the $950,000 gain on land and the $837,000 gain over original cost on buildings to earned surplus were not appealed.

[117] *Supra*, n.10.

[118] *Supra*, n.82.

[119] *Supra*, n.92.

> Therefore, the ratepayer is not entitled to share in any portion of the proceeds of that sale, unless there was a profit on the depreciable portion of the asset sold. There was none in this case.[120]

This language suggests that the Commission has adjudicated the issue of entitlement to the gain realized on the Georgia and Eastern Terminal. This particular determination was not a subject of appeal in *Williams*[121] although it could have been. The issue of entitlement to the gain on the Georgia and Eastern Terminal was tied to its relationship to the streetcar-to-bus conversion program no less than the Fourth Street Shop and Southern Carhouse, as to which Transit has raised its pleas in bar. If the appreciation in land value of the Georgia and Eastern Terminal is available to the farepayers as restitution in the *Democratic Central* cases, as Transit apparently concedes, then so is the appreciation in land value of the shop and carhouse, which has been "adjudicated" under the same considerations.

Even as to the gain on buildings which was allocated to the investors by P.U.C. in Order No. 4577, Transit's thesis is not irrefutable. In the decision on the appeal of Order No. 245[122] the Court intimated a power in the Commission to reopen the 4th Street Shop/Southern Carhouse accounting to make further offsets, at least against streetcar-to-bus conversion costs, from any gains realized on that sale.[123] Moreover, the earlier decisions dealing with the proceeds of the sale of these properties all related to the availability of gains to offset charges arising out of the streetcar-to-bus conversion

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[120] *Ibid.*, at 33-34.

[121] *Supra*, n.14.

[122] *Supra*, n.82.

[123] *Ibid.* at 774-75, where the Commission's action in declining to offset the profits of the sale against other expenses is characterized as discretionary, implying the power to do the opposite.

program.[124] This proceeding deals with the availability of these gains to defray costs upon which fare increases were predicated.[125] It is by no means established that the question of use of the gains on the depreciable portion of these properties to offset a fare increase has been foreclosed by prior decisions, which is a necessary underpinning to a *res judicata* plea.

Therefore, I conclude that—if the appreciation in market value is measured by the proceeds received in excess of unrecovered investment—the entire $1,787,780 allocated to earned surplus[126] ($950,569 related to land, and $837,211 related to buildings) is available for restitution to the farepayers in *DCC-I*, and the $950,569 related to land is available for restitution to the farepayers in *DCC-II*.

2. *Valuation*

This brings me to the next question: should the market-value appreciation of these properties be measured by the difference between the sales price and the unrecovered investment?

These are the only properties that were sold simultaneously with retirement from service.[127] Most of the out-of-service properties have not been sold. Those sold were disposed of after the date they were transferred

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[124] P.U.C. Order No. 4577 and our Order No. 245 and the related appeals. Our Order No. 245 was entered in a fare increase case but, there, gains from this sale were not sought to be applied against anything but the recovery of streetcar-to-bus conversion costs. *Ibid.* at 773-75.

[125] These properties are involved only in the *Democratic Central* cases, which are remands of fare orders.

[126] A portion of the gross gain on the buildings ($613,661) has already been allocated to the farepayers by the P.U.C. in Order No. 4577.

[127] Indeed it was the sale that caused the retirement of these properties on the books. Transit still used these properties in its operations. It leased the 4th Street Shop from RLA for two years after the sale.

below the line on the books. A sale price is normally considered the best evidence of market value. As to every property but these two, an appraisal of market value as of the date of transfer has been necessary because there was no sale contemporaneous with transfer out of service. Here there is such a sale. One would normally assume that the sale price was better evidence of market value on that date than an appraisal made sixteen years later when the buildings had been demolished.

On the other hand, prices associated with sales under condemnation or threat of condemnation are uniformly rejected as evidence of fair market value.[128] The sale of these properties to the urban renewal arm of the District Government was indisputably such a sale. In the light of that fact, and at Transit's request, I directed Mr. Harps, the staff's expert on real estate valuation, to conduct an appraisal of these properties as of January 16, 1959, using standard techniques. This he did, and his report (Staff Exhibit 21) developed an estimate of value for the 4th Street Shop of $1,014,000 and for the Southern Carhouse, $833,500. These valuations assigned no value whatsoever to improvements,[129] finding all the value to subsist in the land. Deducting the original cost of land ($89,089) from the combined estimated value of $1,847,500 leaves a gross gain of $1,758,411, a figure that is, coincidentally, very close to the $1,787,780 found available for restitution to the farepayers if the actual sales price is used to measure market value.

In view of the Court's mandate that the Commission measure "market value" as of the date of transfer,[130] I

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[128] Tr. 364-66, 370.

[129] Indeed the land values were reduced to reflect the cost of the demolition necessary to make the land available for the alternative highest and best use—apartments.

[130] *DCC-I*, *supra*, n.1(a)at 827.

have selected the value estimates in Mr. Harps' appraisals rather than the actual sales price, as allocated by the P.U.C., as the better evidence of market value on the date of transfer.

The remaining question is whether the increase in value, thus determined, must be offset by the $613,661 already allocated to the farepayers. The visceral reaction is to say yes. On the other hand, that allocation was related to the conversion program and has had its effect in that context in relation to other charges for track removal and extraordinary retirement expenses charged to the farepayers. Basing date-of-transfer market value on Mr. Harps' appraisal is worth about $30,000 to Transit. Under Transit's appraisal approach, all the increase in value has been found to inhere in the land. That being the case, it is inappropriate to offset the Order No. 4577 credit to the depreciation reserve against the gain.

I find the market value of the 4th Street Shop and the Southern Carhouse, taken together, as of January 16, 1959, to be $1,847,500, attributable entirely to the land.

Maryland Line Right-Of-Way

This includes a small parcel of land owned in fee in the District of Columbia and easements in Maryland. Mr. Harps, for the staff, appraised the District of Columbia parcel at Florida Avenue and Eckington Place, N. W. A title company, for the staff, rendered an opinion that the Maryland easements would revert upon termination of rail transit operations. Rail service on the Maryland line ceased on April 30, 1959.

Mr. Harps' appraisal (Staff Exhibit 18) estimated the market value of the Florida Avenue and Eckington Place parcel at $16,500. It was recognized that to achieve the highest and best use of this property, which is necessary to support the valuation of $16,500, the streetcar tracks on the property would have to be removed. A cost esti-

mate for track removal was never supplied for the record, however. Transit's limited interest in the Maryland right-of-way has no value.

I find the market value of this property on the date of transfer to be $16,500, attributable entirely to land.

Benning Line Right-Of-Way

This property includes a single parcel of land located at 62nd and Dix Street, N.E. It was retired from service on April 30, 1959. Mr. Harps appraised the property at $4,800 (Staff Exhibit 17), a value estimate that was not disputed.

I find the market value of this property on the date of transfer to be $4,800, attributable entirely to land.

Northeast Carhouse (Fourth Street Estates)
4th and T Streets, N.E.

This property was transferred out of service on May 31, 1959. Subsequently, extensive improvements were made to it at a cost of about $149,000 and it was leased in the Spring of 1962 to the White Motor Company at a rental which rose from $30,000 to $45,000 per year over three years. Later it was leased to the U.S. Post Office at an even higher rental.

Mr. Harps, recognizing the rentability of this property, appraised it on the income approach and checked his conclusion with an assessed-value-ratio analysis. Mr. Harps did not rely on actual post-1959 figures in reaching his value estimate. It was his judgment that, with accomplishment of conversions to the building costing about $21,000, the property could be rented for a gross rent approximating $36,000 per year. Following the income approach to valuation he reached a date-of-transfer value of $417,000, of which $268,500 was attributed to land and $148,500 to buildings.

Transit objected to this appraisal on the basis that it was not an "as is" appraisal as of the date of transfer, but, rather, an income approach to valuation of a property which had no rental history, wasn't rented as of the date of transfer, and required improvements to be made rentable.[131] Conceding these facts, I nevertheless find the objection not well taken in light of Transit's failure to sponsor its own appraisal of the property.[132]

Mr. Harps underwent rigorous cross-examination. For one thing, Transit tested Mr. Harps' conclusion that a mere $21,000 in conversion expenses would have sufficed to produce gross annual rentals of $36,000 as Mr. Harps estimated. Transit introduced financial records showing that more than $149,000 was spent by the company in improving this property between May 1959 when it was retired and April 1962 when it was rented. A lease and related documents revealed that the property rented at rates of $30,000 to $35,000 per year in 1962-1963, and $45,000 in 1964.

Mr. Harps, although pressed upon cross-examination would not agree that achieving a gross rent in the $35,000 range depended on conversion expenditures of almost $150,000. On the witness stand he made an income analysis based on an assumed $45,000 annual rental and a conversion expenditure of $149,000 (Tr. 737-40). This

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131. Transit made similar objections to Mr. Harps' use of the income approach on the M Street Shop and the Navy Yard Carhouse, *qq. v.*

132. Of course, Transit has offered its calculation of value under the assessed-value-ratio method, an offer consistent with its position that all parties and the Commission are bound to use the assessed value method of valuation because of past practice. As pointed out above, this method of valuation is notoriously inaccurate, and in the presence of an alternative I have rejected it. Only if I am bound to use that method would I elect to do so when other appraisal evidence is offered and the sponsor stands cross-examination. Transit could have sponsored an expert valuation based on its theory if it had chosen to do so; alternative positions are not unknown to Transit in this proceeding.

resulted in a valuation of $356,000, some $61,000 less than his own value estimate of $417,000, but Mr. Harps did not accept the lower amount (Tr. 740).

Mr. Harps was also tested by Mr. Thornton W. Owen's appraisal of December 1958 (Transit Exhibit 11) which, based on the income approach, concluded a value for this property of only $305,000. Mr. Owen's appraisal was an "as is" appraisal, *i.e.*, he estimated the rent the property would generate in its condition as of the date it was taken out of utility service without any improvements or conversions. This led Mr. Owen to conclude that the warehouse space would rent for 75¢ per square foot, whereas Mr. Harps' estimate was $1 per square foot. Therefore, Mr. Owen's annual rental figure was $6,500 lower than Mr. Harps'. Mr. Harps found no basis for Mr. Owen's rental figure, however; and with the awareness that the rent on this property did in fact rise over the years he concluded that if his appraisal was wrong, "Mr. Owen is even wronger" (Tr. 749), a conclusion with which it is hard to disagree. Thus, on this record, Mr. Harps' rental estimate must be preferred over Mr. Owen's.

On the other hand, Mr. Harps did adopt the 6 percent interest rate used by Mr. Owen in lieu of the 5½ percent rate he had used (Tr. 750, 752). The effect of this is to change the capitalization rate and reduce the valuation of the property by $35,000 from $417,000 to $382,000. Distributing this $35,000 reduction proportionately to Mr. Harps' original values for land and building produces final date-of-transfer values of $246,000 for the land and $136,000 for the building.

I find the market value of the Northeast Carhouse on the date of transfer to be $382,000, of which $246,000 is attributable to the land and $136,000 to the buildings.

Hearing Officer Decision

Cabin John Line Right-Of-Way

The next property to be retired from utility service was the Cabin John Line right-of-way which was transferred on January 31, 1960. The District of Columbia portion of this property was appraised by Mr. Harps, as if owned in fee by Transit, at $201,500 (Staff Exhibits 20 and 28). Transit accepted Mr. Harps' valuation subject to the customary reservation that the assessed-value-ratio method is required. A title company, for the staff, rendered an opinion that the Maryland portion of this right-of-way traversed easements which reverted to the original owners when rail service ended. Transit's limited interest in the Maryland right-of-way has no value.

The title company also rendered an opinion that three separate parcels within the District of Columbia portion of this right-of-way were not owned in fee simple by Transit. As a result, the staff and Transit entered a stipulation: these parcels contain a total of 88,914 square feet; Mr. Harps valued these parcels upon the basis of 25 cents per square foot; and the appraisal by Mr. Harps ($201,500) should be reduced by the value of the parcels not owned in fee simple ($22,228.50) resulting in a net value for the District of Columbia-Cabin John Line of $179,271.50.

Although the staff and Transit agreed to reduce the value, they did not submit any corresponding data to support a reduction in the unrecovered investment. The parties are urged to stipulate as to this amount. The stipulation as to value and any stipulation or calculation of the reduction in unrecovered investment should be submitted to the Commission.

I find the value of the District of Columbia property at date of transfer to be $201,500 as appraised by Mr. Harps.

Hearing Officer Decision

Georgia and Eastern Avenues Terminal

This property was transferred out of service on October 31, 1960.[133] Mr. Harps' date-of-transfer valuation of this property (Staff Exhibit 15) in the amount of $187,800, entirely attributable to the land, was accepted by all parties subject to reduction by an amount adequate to cover the costs of removing trolley tracks and the terminal building. At this writing, these offsets have not been supplied for the record, and market value as of October 31, 1960, is, therefore, found to be $187,800.

14th and V Streets, N. W. Substation

This property was transferred out of service on January 31, 1962.[134] It was appraised as of that date by Mr. Harps (Staff Exhibit 11) at $23,800. This estimate of value was undisputed and I find the value of this property on that date to be $23,800, of which $16,700 is attributable to the land and $7,100 to the building.

13th and D Streets, N.E. Storage Yard

This unimproved property was transferred out of service on January 31, 1962.[135] It was appraised by Mr. Harps at $4,755 as of that date (Staff Exhibit 16). This valuation was not questioned, and I adopt it as my finding of the market value of this land as of January 31, 1962.

Navy Yard Carhouse
(L Street Estates), 770 M. Street, S.E.

This property was taken out of service on June 30, 1963. As of that date there was a lease of the first floor to the U.S. General Services Administration for a five-

133. It was sold in December 1962 for $225,000.

134. It was sold in June 1971 for $25,000.

135. It was sold in May 1970 for $8,150.

year term starting July 1, 1963. Expenses to improve the building to meet the government's requirements were incurred after the date of transfer in late 1963 and early 1964. It is not clear from the record when the government actually occupied this property.[136]

Mr. Harps' appraisal of this property is Staff Exhibit 19. He used an income approach to valuation. Mr. Harps' estimate of value was admitted over Transit's objection that it was not an appraisal of the property in its unrenovated, "as is" condition as of the date of transfer (Tr. 841, 1660).

The approach used by the appraiser seems reasonable in the circumstances, particularly considering the fact that this property was substantially leased within a week of its retirement. The only alternative approach to date-of-transfer valuation in the record is Transit's extrapolation of the assessed value. This is not a preferred method of appraisal in any case, and appears to be specially inapplicable here because of the variation of the assessed value of this property from the normal range of error. The assessment of this property had not changed since at least 1956. (Tr. 865-72).

Under cross-examination Mr. Harps revised his value estimate downward from $725,000 to $666,500. These changes resulted from: first, an adjustment upward in the expenses to be capitalized, which reduces income, and hence value, under the income approach; and, second, an upward adjustment in the conversion expenditure required to render the property rentable.

Mr. Harps' approach to conversion cost, a dollar-for-dollar deduction from gross value, gave the benefit of

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136. The original lease was amended to revise the commencement date to July 8, 1963. Later addenda to the lease suggest that the government expanded its occupancy to the remaining 8,200 square feet on the first floor in July 1975, and to the 27,600-square-foot second floor in January 1966 (Staff Exhibit 19, p.8).

every doubt to Transit. For example, retirements were not netted against the gross cost of conversion (Staff Exhibit 19, p.6). There was generous allowance ($50,000) for entrepreneurship (Staff Exhibit 1, p.11). A vacancy rate of 6 percent was posited even though the lease was to the government. Extrapolation of the original conversion cost of $2.77 per square foot to the entire building was accepted, even in the absence of evidence of any expenditures. I accept these adjustments for additional conversion expense as did Mr. Harps.

I find the value of this property as of June 30, 1963, to be $666,500 of which $427,500 is attributable to the land and $239,000 to the building.

M Street Shops (M Street Estates)
3222 M Street, N.W.

This property was transferred out of service on June 30, 1963, and sometime subsequently leased to the U.S. Government after rather extensive renovation, which took place after June 30, 1963.

Mr. Harps' appraisal report is Staff Exhibit 5. His narrative report (Staff Exhibit 1) suggested that the cost approach to valuation would be the most appropriate method to estimate the value of this property. In fact, when it came time to do the appraisal, Mr. Harps used an income approach to valuation. His selection of that method is explained (Tr. 627-38) and seems reasonable. He estimated date-of-transfer market value to be $984,000, $660,000 for the land and $324,000 for the building.[137]

The approach to valuation of this property should be compared to that of the Navy Yard and Northeast carhouses. Those properties, like the M Street Shops,

[137] The building valuation was reduced by $7,200 under cross-examination (Tr. 727).

were taken out of service and then renovated before occupancy by tenants. The lapse in time between retirement and rental was only a week at Navy Yard, 3½ years at Northeast and, apparently, something in between at M Street. At Navy Yard, due to the contemporaneous retirement from service and lease, Mr. Harps looked at actual costs of renovation and actual rentals. I accepted his Navy Yard valuation in part because of the accuracy of these virtually contemporaneous data. At Northeast he estimated both cost of conversion and the rent. Transit demonstrated that the actual cost of renovation of the Northeast Carhouse was substantially higher than Mr. Harps' estimate; it also developed that the rent was higher than Mr. Harps' estimate. Using actual figures for rent and conversion expense, Mr. Harps developed a valuation on cross-examination, and it was lower than his original appraisal. I did not accept the valuation based on actual data, primarily because the data on which it depended dated from a period long after the date of transfer.[138]

In the case of the M Street Shops, as in Northeast Carhouse, Mr. Harps rendered his date-of-transfer value estimate on the income approach based on estimated conversion costs and estimated rent. In contrast to the Northeast Carhouse, there was no evidence presented of either actual conversion costs or actual rentals. Thus, the issue was not whether to prefer a set of out-of-time data or appraiser's estimates of what those data would have been at date of transfer. Rather it was whether to accept the income approach to value or the cost approach, as Mr. Harps originally indicated he would use.

Transit urges that Mr. Harps' income approach, involving, as it does, estimates of both rent and renova-

[138] This knowledge could not have been available at or about the date of transfer; and the usage that actually resulted was somewhat different than Mr. Harps had posited.

tion costs, introduces so great a speculative element into his valuation as to render it of little probative value and even inadmissible as evidence in a condemnation case. Whatever the merit of this argument may be, Transit offered no alternative "as is" appraisal on the record. It sponsored no witness, offered no other appraisal to challenge Mr. Harps' on cross-examination, presented no evidence of actual rents or conversion costs, and did not develop—in any manner—a 1963 cost-approach valuation of the property. Thus, the only evidence of 1963 valuation other than Mr. Harps' appraisal is Transit's assessed-value-ratio figure. This produces a value estimate of $705,800[139] a figure unsupported by expert opinion.

I find the value of this property on June 30, 1963, to be $976,800 of which $660,000 is attributable to land and $316,800 to the buildings.

Grace Street Shop (Grace Street Estates)
3211 Grace Street, N.W.

The date of transfer of this property is September 30, 1963.

Inconsistencies between the appraiser's narrative report (Staff Exhibit 1) and the later appraisal report on this specific property (Staff Exhibit 6) were reconciled or explained by Mr. Harps on cross-examination (Tr. 443-57). He also explained his deduction of 24 percent of the value of the building for functional obsolescence when appraised as a truck garage as of 1956, and his nonrecognition of any functional obsolescence in his appraisal as of 1963, which contemplates full use of the cubic capacity of the building (Tr. 468-85, 489).

[139] Assessed value in fiscal 1963 was $458,752, of which $301,652 was land and $157,100 was improvements. I have divided both these figures by .65 to reach the assumed market value of $705,800.

On cross-examination Mr. Harps agreed to reduce the value estimate of the building in 1963 from $109,153 to $88,809 to take account of functional obsolescence and physical depreciation. Although his original appraisal of 1963 value averaged the results obtained from the cost approach and the assessed-value-ratio approach, on cross-examination Mr. Harps conceded that the cost approach to valuation would be preferable for this property (Tr. 904-05).

I find the market value of this property on September 30, 1963, was $234,000, of which $145,500 is attributable to land and $88,500 to the building.

General Office Building
(3600, Inc.) 3600 M Street, N.W.

This property was transferred out of service as of January 1, 1964. It was appraised as of the date of transfer by Mr. Harps, whose report became Staff Exhibit 10. Following the income approach to valuation he estimated the date-of-transfer market value to be $2,115,000 ($402,000 for the land and $1,713,000 for the building). At Transit's request Mr. Harps also valued this property on the cost approach, which resulted in a value estimate of $1,930,500.[140]

This, of course, raised the issue of which approach to valuation was appropriate in the circumstances. Mr. Harps persistently and vigorously denied the reliability of the cost approach method to produce a valid estimate of the market value of this property, which was, for all practical purposes, a commercial office building and not special purpose utility property. As he put it, the market would value this property on the basis of its income potential.[141] I accept Mr. Harps' judgment on this ques-

[140] Transit Exhibit 13; Tr. 791-99, 814-17.

[141] Tr. 816-17; Transit Exhibit 13, p. 4.

tion, and conclude that the property should be valued on the income approach, and that alone.[142]

A significant element contributing to both the cost and market value of this property was the improvements made to this property while in Transit's hands. There was disagreement over the amount expended on these improvements, specifically, whether certain of them were contracted for, performed, or paid for before or after the date of transfer, which makes a difference in the valuation. The amount of pre-1964 improvements reported ranged between $673,024, as reported by Mr. Harps, and $512,321, as reported by Mr. Loconto. Between these was the $566,790 figure reported by Transit's witness, Mr. Hatfield. Mr. Harps' report was the most thorough and careful work-up of the available data and his cost estimate of $673,024 will be accepted as the cost of improvements made between the date of acquisition and the date of transfer.

From the date this property was transferred below the line on Transit's books right through the date Transit ceased utility operations in January 1973, the company continued to occupy a portion of the rentable space for use in the general and administrative functions of its utility business.[143] This has presented a problem in valuation, which has required a separate inquiry in the latter days of this proceeding to ascertain how much of the property was used by Transit for utility purposes,

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[142] Transit is apparently of the belief that Mr. Harps has accepted the average of the cost-approach and income-approach valuations as his estimate of value. Rather, he insisted that from his standpoint a cost-approach appraisal was not applicable (Tr. 817). His apparent acceptance of an average of the cost- and income-approach valuations was premised on an assumption that the Commission might consider the cost approach to be appropriate, in which case Mr. Harps believed its result be averaged with the result obtained from the income approach.

[143] Tr. 788, 2241.

whether this usage was charged to the farepayers, and what financial adjustments are required to take account of these facts.

At first it was assumed that Transit occupied about 40 percent of the rentable space throughout the years in question.[144] This gave rise to Transit's suggestion that only 60 percent of the property be deemed transferred and that net gain be computed accordingly. Staff, on the other hand, has recommended that the gain be computed on the basis that the entire property was transferred and that an "equitable offset" be allowed against net gain in an amount equal to the fair rental value of the premises used by Transit for utility purposes.[145] Therefore, calculation of the rental value of the space occupied by Transit was required. This was duly made, and a stipulation entered by staff and Transit on the matter was accepted for filing.[146] This stipulation would reduce the net gain by an agreed-upon fair rental value of $918,278. It was based on the assumption of a constant 40 percent occupancy by Transit.

However, there was a suggestion in the *Williams* case that Transit's occupancy was not 40 percent of the premises as the stipulation posited, but 20 percent.[147] Therefore, I directed the staff to investigate the matter further. This investigation, which went on from October 1977 to January 1978 produced evidence that Transit's occupancy declined from 40 percent to 20 percent to 10 percent of the premises over time, and that some of the

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[144] That is, January 1, 1964 through June 30, 1970 (Tr. 2555).

[145] Interestingly, Transit's and staff's positions on this property are opposite in theory to their views of how to treat the Brookland, Eastern and Trinidad garages. Here, Transit would have us view the property on the basis of its actual use and not its book status, and staff would look to its status on the books and not its actual use.

[146] Tr. 2241-50.

[147] *Williams, supra,* n. 14 at 957.

expenses of the building were charged to utility operations thereby reducing the benefit flowing to farepayers from Transit's rent-free use of the property in utility operations. Transit's "floating" occupancy level and the partial charge of building expenses to utility expense accounts makes Transit's suggestion for "partitioning" the property and calculating net gain on only a portion of it too unwieldy to carry out. Therefore, I have dealt with the property as an entirety, subject to reduction of the related restitution to the farepayers for the benefits they may have derived from its partial use for utility purposes at less than full cost.

The staff's investigation prompted a revision of the stipulation between staff and Transit to reduce the equitable offset from $918,278 to $282,690. This stipulation was entered into the record on February 8, 1978[148] along with supporting memoranda[149] and discussed at a hearing on that date. On the basis of the record thus developed I have accepted the stipulated figure as equivalent to the benefit conferred on the farepayers by Transit's partial occupancy of the premises at a cost below its value and recommend that the $282,690 be offset against the restitutional award in this proceeding.

This is not the final issue on this question. B.U.F. points out that the effect of the offset differs if it is made against gross gain instead of net gain:[150]

	Gross Gain Method	Net Gain Method
1. Market Value	$2,115,000	$2,115,000
2. Unrecovered Investment	(840,000)	(840,000)
3. Gross Gain	1,275,000	1,275,000
4. Equitable Offset	(280,000)	N.A.
5. Balance	995,000	1,275,000

[148] Tr. 2556-57.

[149] Staff Exhibits 38 and 39.

[150] Figures are rounded in this illustration.

		Gross Gain Method	Net Gain Method
6.	Sales Expense	(80,000)	(80,000)
7.	Taxes (25% × 1.5).....	(250,000)	(320,000)
8.	Balance	665,000	875,000
9.	Equitable Offset.....	N.A.	(280,000)
10.	Restitution to Farepayers ...	$665,000	$595,000

As the illustration shows, the amount of restitution differs depending on whether the offset is taken against gross or net gain.[151] I have determined that the offset, if allowed, should be taken on the net gain after taxes. The building is deemed to have been transferred *in toto* on January 1, 1964. The Court's directive requires that net gain be computed as of that date. The benefit to farepayers from below-cost occupancy occurred after that; it should therefore be recognized and taken into account after that event, *i.e.,* against the net gain recognized in this proceeding.

Parking Lot 36th and M Streets, N.W.

Date of transfer of this unimproved property was January 1, 1964. Mr Harps' appraisal placed its market value on that date at $14,900. There was no dispute with this figure and it is accepted.

Brookland, Eastern and Trinidad Garages

I find the date of transfer of these properties to be September 11, 1966. On that date the new Bladensburg Maintenance Base went into service. The functions formerly carried on at these three garages were thereafter

[151] This conclusion, of course, assumes that the equitable offset reduces taxable gain, an assumption that I have accepted for purposes of this discussion.

conducted at Bladensburg, and it is undisputed that after September 11, 1966, these properties were not used in utility operations.[152]

On March 2, 1966, the company applied to the Commission to consolidate the operations from Brookland, Eastern and Trinidad at Bladensburg and to divest itself of the three old garages.[153] This application was withdrawn, at the request of Commission staff according to a company officer (Tr. 1230). In a subsequent filing[154] in August the company applied merely to consolidate operations at Bladensburg, but not to abandon or divest itself of the garages at Brookland, Eastern, and Trinidad. This application was granted by Commission Order No. 634,[155] which also directed:

> That the units of property now housing the Brookland, Trinidad and Eastern Divisions be retained as operating property to provide for supplementary service requirements which may arise in the overall operations of the company.[156]

Credence is lent to the claim that Commission staff sought withdrawal of the application to remove these properties from service in the Spring of 1966, by the correspondence in time between Application No. 361 and the promulgation of Commission Regulation 61, which was noticed on March 25, 1966, and finally enacted in revised form on September 30, 1966, by General Order No. 17. Regulation No. 61, it will be remembered, is the rule pursuant to which accrued depreciation attributable to utility property is recaptured

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[152] Brookland Garage was apparently used to store retired buses, but I do not consider this to be a utility function.

[153] Application No. 361.

[154] Application No. 386.

[155] (WMATC, unreported) August 19, 1966.

[156] *Ibid.* at p. 2.

for the farepayers when utility property was taken out of service.[157] It would certainly have been an embarrassment if these three properties, upon which a total of $959,171 in accrued depreciation was subject to recapture under Regulation No. 61, had been removed from service just before Regulation No. 61 took effect.

As a result of Order No. 634 these three properties remained on Transit's books as operating properties: Brookland and Eastern garages until 1973 when the company ceased utility operations,[158] and Trinidad until May 8, 1970, when it was sold to the Redevelopment Land Agency.[159]

Order No. 634 suggests that the Commission or its staff, or both, were skeptical about the wisdom and efficiency of shifting so much of the company's maintenance and operating facilities to Bladensburg and desired the superseded properties to be kept in technical operating status so that operations could be re-established there if Bladensburg did not work as planned. The Bladensburg alternative apparently proved acceptable to the company and the Commission because operations were never re-established at the three garages. However, Order No. 634 was never rescinded as to Brookland and Eastern.[160]

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[157] Actually, under Regulation No. 61 as originally noticed, even values in excess of accrued depreciation might have been credited to farepayers.

[158] WMATA did not acquire these properties.

[159] Trinidad's retirement had actually been authorized on July 3, 1967, by Commission Order No. 718 (unreported).

[160] *Ibid.*

Transit's position is that the Court's mandate does not extend to the two properties (Eastern and Brookland) that never were removed from operating status, an event which Transit deems to be a prerequisite before their increase in value may be credited to the farepayers.[161]

The staff is adamant that the farepayers are entitled to the increase in value of these properties and that their "date of transfer" was September 11, 1966, when they ceased to function as operating utility properties, notwithstanding their status on the books. The staff presented evidence in support of this proposition through witness Loconto who listed several reasons for deeming them nonoperating and out-of-service as of September 11, 1966: no improvements were made on them after 1966 (in fact improvements ceased several years prior to that); the company's 10-K reports to the SEC showed them as "investment" property rather than operating property; the company formed subsidiaries with an apparent purpose of taking title to these properties as it had with several other properties removed from utility status; the Commission authorized the sale of the Trinidad Garage shortly after Order No. 634[162] indicating that this property was not needed in transportation operations; the company's apparent belief that the three garages had no further use for utility purposes as evidenced by application to have them transferred to nonoperating status;[163] and WMATA's determination in 1973 that Brookland and Eastern garages had no usefulness as elements of a mass transit system (Tr. 30-33). Staff, consistently with its view, offered appraisals by

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[161] The company does not dispute the farepayers entitlement to the increase in value of Trinidad Garage. As to Trinidad the dispute is over the date of transfer, which staff insists is September 11, 1966, and Transit says is either the date of sale (May 8, 1970) or the date sale was authorized (July 3, 1967).

[162] See n.159.

[163] See n.153.

Mr. Harps of the market value of these properties as of September 11, 1966.[164] These appraisals presented value estimates based on the income approach. In determining the highest and best use, Mr Harps assumed no limitation on the usage to which the properties could be put.

Transit argued the properties were hardly salable, encumbered as they were by the stricture of Order No. 634 that they be available to meet transit needs that might arise. My suggestion that Order No. 634 would have been lifted in the event of a prospective sale was characterized as "speculative",[165] notwithstanding the rapid change in the Commission's position in the case of Trinidad Garage, where sale was authorized only 10 months after Order No. 634 had been entered. Transit claims that the Trinidad precedent is not indicative because it was sold to the urban renewal agency (RLA) "under threat of condemnation." In fact the RLA purchase did not take place until May 1970, almost three years after sale had been authorized by Order No. 718.[166] There is a sense of urgency about Order No. 718, as if the authorization to sell was hurriedly entered[167] in order to gain the advantage of a prospective private sale. This is only supposition, however; there is no evidence that this was the case either in the record of this proceeding or in the Commission files I have consulted.

Having this background in mind, I acceded to Transit's request that Mr. Harps make a second appraisal of these properties, as of September 11, 1966, taking into account their "encumbered" status resulting from the directive of Order No. 634. These appraisals were re-

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[164] Staff Exhibits 7 (Trinidad), 9 (Eastern), and 13 (Brookland).

[165] Tr. 498.

[166] See n.15.

[167] In fact it was rushed out in four days, the application having been filed on June 29.

ceived into evidence[168] with revisions.[169] The staff, while adhering to its position that valuation should be made as of September 11, 1966, the date of *de facto* removal from service, did agree that valuation as of that date should not ignore the effect of Order No. 634 on the value of the properties. Accordingly, the staff sponsored Mr. Harps' second appraisals with revisions and did not offer the original appraisals into evidence.

I have agreed with this approach. My findings as to the market value of these individual properties follow.

Eastern Garage

Mr. Harps made two appraisals of this property as of September 11, 1966. The first, Staff Exhibit 9, reached a value of $1,033,000, entirely in the land, on the basis of a highest and best use as of that date as a shopping center, and assumed that the property was available for that use on that date. The second, Staff Exhibit 22, was made at the direction of the chair and subject to an instruction that the appraiser take into account the terms of Order No. 634 in determining the highest and best use. Mr. Harps concluded that Order No. 634 was in effect, an encumbrance on the site, denying it the highest and best use so long as the order was in effect. Accordingly, Mr. Harps appraised the property as an element of a transit system. This led him to abandon the income approach to valuation in favor of the cost approach. His cost-approach appraisal was an update of the cost-approach appraisal he had used to estimate value as of August 15, 1956. Land value in September 1966 was estimated at $584,000, an increase from the 1956 value commensurate with the decline in purchasing power of the dollar, albeit substantially lower than the Exhibit 9 land value

[168] Staff Exhibits 22 (Eastern), 23 (Brookland), and 24 (Trinidad).
[169] Staff Exhibits 22-A, 23-A, and 24-A.

estimate for the property in its highest and best use. The estimate of value of the building was $362,000, a decrease from the 1956 value estimate attributable to greater physical depreciation and functional obsolescence. The 1966 valuation, taking Order No. 634 into consideration, was $946,000, $584,000 attributable to land and $362,000 to the building.

This estimate of value was futher reduced, to take account of "economic obsolescence" attributable entirely to Order No. 634.[170] Economic obsolescence is a term appraisers use to describe a diminution of value attributable to an externality—such as the limitation of Order No. 634. To calculate it in this case, Mr. Harps made the assumption that the restriction would be lifted in September 1978, twelve years after it was imposed, and that the property could then be rezoned and sold for town house development for $1,215.000 the present worth of which he calculated at $396,333 as of September 1966. He also assumed that even under the Order No. 634 restriction the property could be leased on a short-term basis for truck parking at $26,000 per year for the twelve years that Order No. 634 would be in effect, which gave an economic value of $186,181[171] to the rental income stream. Summing capitalized income of $186,181 and discounted reversion of $396,333, he rounded the value to be $582,500 in the property as of September 1966. He felt compelled to accept this value and not the $946,000 calculated on the cost basis. The difference of $363,500 he described as economic obsolescence due to Order No. 634 "which was not needed."[172]

As events have demonstrated, the Order No. 634 restriction was not needed for Eastern Garage. It was

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[170] See Staff Exhibit 22-A.

[171] Erroneously reported as $181,178 in staff Exhibit 22-A.

[172] His words, Exhibit 22-A pp. 1, 3.

never called back into service to meet "supplementary service requirements" because they never arose. While we can now say that Order No. 634 was not needed, that could not have been said in 1966. To the contrary, the Commission determined that the restriction was needed. The cost of meeting that need was the economic loss that it occasioned, namely a reduction in the market value equal to the "economic obsolescence" brought about by withholding the property from the marketplace at its highest and best use.

Frankly, I missed the significance of this point in my July 24, 1977, finding that its date-of-transfer market value was $946,000. I recommend that the Commission review this finding carefully, as I now believe that an offset for economic obsolescence is appropriate. I do not agree with Mr. Harps' assumption that Order No. 634 would have remained in effect through September 1978. Rather, it seems to me that August 15, 1976, when Transit's franchise term would end, is the appropriate date. Our power to restrict the usage of that property would have ended there. A valuation as of August 15, 1976, would probably increase the value of the reversion slightly and decrease the value of the income stream. The parties are invited to supply their calculation of August 15, 1976, value for the record.[173]

Brookland Garage

Much of the discussion related to Eastern Garage applies to this property.

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[173] Staff Exhibit 9 was admitted into evidence. If this ruling is deemed erroneous and it is held that the property should be valued on the basis of that appraisal, I adopt Mr. Harps' value estimate (land, buildings, and total) as my finding of market value on date of transfer.

It was appraised twice by Mr. Harps. His first appraisal (Staff Exhibit 13) valued the property in a highest and best use as a service garage at $958,000,[174] based on the average cost approach and income approach value estimates. His second appraisal of the property (Staff Exhibit 23) gave effect to Order No. 634 which Mr. Harps interpreted as restricting use to utility functions. This appraisal made on the cost approach, the customary method for special purpose property, resulted in a value estimate of $816,500.[175] Then, as with Eastern Garage, he considered the destruction of economic value caused by Order No. 634 which in effect postponed the day when this property could be put to its highest and best use. Mr. Harps assumed that this restriction would be lifted in September 1978, calculated its value, unencumbered, as of that date, and discounted that value to September 1966. To this value he added the capitalized value of the net rental income that he assumed the property would produce in the meantime. The sum of these: income capitalized plus reversion discounted, represented Mr. Harps' estimate of a value as of September 1966 which took economic obsolesence into account. This value, $672,000, was less than either the cost-approach valuation of Exhibit 23, or the highest and best use valuation of Exhibit 13. The difference represented the economic obsolescence or value diminution caused by Order No. 634.

My original market value findings in July 1977 did not take economic obsolescence into account, but only the reduction in value attributable to the restriction on use

[174] Land $547,000; building $411,000.

[175] Land $377,000; building $439,500.

imposed by Order No. 634. I recommend that the Commission review this matter on the same basis as I have recommended for Eastern Garage.[176]

Trinidad Garage

This property, along with the Brookland and Eastern garages, was subjected on September 11, 1966, to the Order No. 634 constraint that it be retained as operating property ". . . to provide for supplementary service requirements which may arise in the overall operations of the company." However, some ten months later, in July 1967, Transit was given permission to sell this property by Commission Order No. 718. Order No. 718 spoke of an "immediate sale"; the prospective purchaser was not identified. The immediate sale did not occur, and the property was not sold until May 8, 1970, when the District of Columbia Redevelopment Land Agency purchased it for $500,000. The $500,000 proceeds of sale were attributed entirely to the land: $40,730.28 was applied to retire the land at its original cost and the balance of $459,269.72 was credited to earned surplus (*i.e.*, to the investors) pursuant to our Regulation 61-04.[177] No appraisal of the property was made in 1967 or 1970, even though one was called for under our Regulation 61-03. This property was not used in utility service at any time between September 11, 1966, and its sale in May 1970.

Transit's position is that, unlike Eastern and Brookland garages, Trinidad Garage may properly be considered in this proceeding and that its date of transfer is

[176] Staff Exhibit 13 was admitted into evidence. If this ruling is deemed erroneous and it is held that the property should be valued on the basis of the appraisal, I adopt Mr. Harps' value estimate (land, buildings, and total) as my finding of market value on date of transfer.

[177] There is thus no claim of equitable offset as in 4th Street Shop/Southern Carhouse.

either July 3, 1967, when it was authorized to be sold or May 8, 1970, when it actually was sold.[178] The staff, relying on the fact that the property was not used in utility operations after September 11, 1966, thus claims that as the date of transfer. Several appraisals of this property, all by Mr. Harps, were offered. Staff Exhibit 7 as revised by Staff Exhibit 7-A is Mr. Harps' value estimate for this property in its highest and best use as of September 11, 1966. Staff Exhibit 24, revised by Staff Exhibit 24-A, is Mr. Harps' value estimate of this property as of that date, but encumbered by the restriction of Order No. 634. No appraisal of value is in evidence for either July 1967 or May 1970, although the actual sale price in 1970 ($500,000) is known.

I find, consistently with the finding for Eastern and Brookland garages, that the date of transfer of this property is September 11, 1966. In common with the Eastern and Brookland situations, I concluded that it would be inappropriate to value this property as if Order No. 634 did not exist. Accordingly, amenable to Transit's request, I directed Mr. Harps to re-appraise this property giving consideration to the effect of Order No. 634 on market value. Staff Exhibits 7 and 7-A were not admitted into evidence.[179] Staff Exhibit 24 was a cost-approach value estimate as is customary for special purpose property. To calculate the economic obsolescence occa-

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[178] Transit is indifferent as between these dates because the assessed value was the same on both dates and Transit's position is that market value must be calculated on the assessed-value-ratio method.

[179] If this ruling is deemed erroneous and it is held that the property should be valued on the basis of that appraisal, I adopt Mr. Harps' valuation estimate (land, building, and total) as my finding of market value on date of transfer. These values need not be reduced further for additional demolition costs as suggested at Tr. 574-78. There is no evidence that the buildings to be demolished aggregated more than the 41,350 square feet originally estimated by Mr. Harps.

sioned by Order No. 634, an income approach valuation was also made (Staff Exhibit 24-A) which resulted in a final value estimate of $436,500, inhering entirely in the land.

As in the case of Brookland and Eastern garages, my original finding of date-of-transfer value failed to take account of economic obsolescence. I believe the Commission should reconsider this aspect of the matter. If the September 1966 date of transfer is adhered to, then I believe the property should be deemed available to fulfill its highest and best use as of August 15, 1976, when Transit's franchise expired rather than September 1978 as Mr. Harps suggested.

If, on the other hand, the Commission accepts Transit's view that situation *de jure* rather than *de facto* is determinative of the date of transfer, it will reject September 11, 1966, as the date of transfer for the Trinidad Garage. In that event, I find July 3, 1967, when the property was authorized to be sold, is the date of transfer rather than May 8, 1970. This finding would be consistent with the Court's view that transfer out of service and not sale and realization of gain is the touchstone of farepayer entitlement to value appreciation. Moreover, it will permit a market value determination to be entered on the record that is developed in this proceeding. The record supports my alternative finding that market value in July 1967 is $525,000. I base this finding upon Mr. Harps' estimate of market value in highest and best use as of September 1966, which I have increased by aproximately 3 percent, his estimate of the annual increment in land value.

To extrapolate Mr. Harps' 1966 appraisal to 1970 is a somewhat shakier proposition. To accept the $500,000 sale price in 1970 is also questionable—this sale was made under threat of condemnation, and Transit was in a very weak bargaining position in 1970 as is evidenced

by the application of the proceeds of sale to meet current liabilities. Even on an assessed-value-ratio basis of computation a 1967 value of $500-525 thousand is suggested.[180]

[180] The $325,647 FY 1966 assessment divided by .65 = $500,995 plus an increment of 3 percent for passage of one year's time = $516,025 ±.

Table II

DATE OF TRANSFER MARKET VALUES AND GROSS GAIN

(1) Property	(2) Date of Transfer	(3) Date of Transfer Market Value	(4) Unrecovered Investment (Per Table I)	(5) Gross Gain Col(3) minus Col(4)
Central Garage	09-30-58			
Land		$ 322,000	$ 19,315	$302,685
Bldg		610,200	212,172	398,028
Total		932,200	231,487	700,713
Fourth Street Shop	01-16-59			
Land		1,014,000	48,912	965,088
Bldg		—0—	354,389	(354,389)
Total		1,014,000	403,301	610,699
Southern Carhouse	01-16-59			
Land		833,500	40,177	793,323
Bldg		—0—	110,962	(110,962)
Total		833,500	151,139	682,361
Maryland Line: Right-of-Way	04-30-59	16,500	4,301	12,199
Benning Line: Right-of-Way	04-30-59	4,800	974	3,826
Northeast Carhouse	05-31-59			
Land		246,000	36,151	209,849
Bldg		136,000	66,472	69,528
Total		382,000	102,623	279,377
Cabin John Right-of-Way	01-31-60	201,500	96,237	105,263
Georgia and Eastern Terminal	10-31-60			
Land		187,800	31,199	156,601
Bldg		—0—	5,986	(5,986)
Total		187,800	37,185	150,615
14th and V Streets Substation	01-31-62			
Land		16,700	9,038	7,662
Bldg		7,100	474	6,626
Total		23,800	9,512	14,288
13th and D Streets Storage Yard	01-31-62	4,755	976	3,779
Navy Yard Carhouse	06-30-63			
Land		427,500	106,562	320,938
Bldg		239,000	5,445	233,555
Total		666,500	112,007	554,493

Table II

DATE OF TRANSFER MARKET VALUES AND GROSS GAIN
(Continued)

(1) Property	(2) Date of Transfer	(3) Date of Transfer Market Value	(4) Unrecovered Investment (Per Table I)	(5) Gross Gain Col(3) minus Col(4)
M Street Shop	06-30-63			
Land		$ 660,000	$ 65,793	$ 594,207
Bldg		316,800	10,081	306,719
Total		976,800	75,874	900,926
Grace Street Shop	09-30-63			
Land		145,500	11,294	134,206
Bldg		88,500	20,906	67,594
Total		234,000	32,200	201,800
General Office Building	01-01-64			
Land		402,000	44,127	357,873
Bldg		1,713,000	795,275	917,725
Total		2,115,000	839,402	1,275,598
Parking Lot	01-01-64	14,900	579	14,321
Brookland Garage	09-11-66			
Land		377,000	103,659	273,341
Bldg		439,500	—0—	439,500
Total		816,500	103,659	712,841
Eastern Garage	09-11-66			
Land		584,000	74,867	509,133
Bldg		362,000	—0—	362,000
Total		946,000	74,867	871,133
Trinidad Garage	09-11-66			
Land		270,500	40,733	229,767
Bldg		194,000	—0—	194,000
Total		464,500	40,733	423,767
Total Land		5,728,955	734,894	4,994,061
Total Bldgs		4,106,100	1,582,162	2,523,938
GRAND TOTAL		$9,835,055	$2,317,056	$7,517,999

VI. *Sales Expenses and Income Taxes*

In *DCC-I* the Court held, ". . . that the farepayers were entitled to all appreciations in the value of the assets in issue, depreciable and nondepreciable, accruing during their tenure as operating properties."[181] This finding was qualified as follows:

> In referring to the amount of appreciation or gain on the assets while in service, we are speaking of a net figure. The amount which should be credited to the farepayers is not the entire difference between book value and market value of the assets at the time of transfer, but rather that sum minus the taxes and sales expenses which would have been deducted from Transit's profit if the assets had been sold outright instead of simply being moved into nonoperating status.[182]

The opinion in *DCC-II* is not so explicit on this point.[183] In *Bebchick-II,* the Court was precise; the Commission was directed to compute the net gain ". . . taking into account taxes and costs which might have reduced the gain if the properties had been sold."[184]

I have understood the Court's decisions to require that Transit's investors be kept whole. Therefore, I have offset sales expenses and taxes against gain on a consistent basis for all the properties in every remanded docket.

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[181] *Supra,* n.1(a) at 822.

[182] *Ibid.* at n. 343.

[183] In *DCC-II* the Court directs that the failure to benefit the riders by the increased market values should ". . . be handled as we have suggested . . . in *Democratic Central Committee.*" [citing *DCC-I*], *supra* n.1(e) at 915. There is no specific direction to offset sales expenses and taxes against the gain.

[184] *Supra*, n.1(c) at 876. Also see n.122 at 873 and n.137 at 875.

A. *Sales Expenses*

Sales expenses fall into several categories. There is a question whether all the categories proposed should be recognized. I have entered findings on the issue of recognition *vel non* and I have also made findings of the amount of expense in every category in order that there shall be an offset amount available even in the disputed expense categories. My findings are set out in Table III which appears at the end of this subsection.

Testimony on this subject was received from Mr. Hatfield for the company, Mr. Harps for Black United Front (B.U.F.),[185] and Mr. Peterman for Mr. Bebchick.

1. *District of Columbia Deed Recordation Tax, United States Internal Revenue Stamp Tax.*

These taxes, which present no special theoretical problems are treated in the sales expense category.

There was no disagreement with Mr. Harps' testimony that these excise taxes should be recognized as expenses to the seller in a real estate conveyance. Mr. Harps calculated taxes at the applicable rates on the date of transfer in accordance with the market valuations set forth in my preliminary findings of July 1977. As such, there was no dispute with Mr. Harps' calculations and they are accepted. Recalculation would be necessary in some cases if a different date of transfer is determined because tax rates changed from time to time. The District of Columbia and federal taxes are *ad valorem* exercises, and so recomputation is required in every instance in which a different market value is found.

[185] B.U.F.'s sponsorship of Mr. Harps was objected to by Transit. His testimony was received over objection.

2. *Settlement Charges.*

The settlement charges advanced by Mr. Harps are also accepted although they are probably a little bit low. The record presents no basis upon which to increase them in an informed way, and, in any case, the amount involved is *de minimis*.

3. *Brokerage Commissions.*

This is a major expense in selling real property. The B.U.F., by sponsoring Mr. Harps, and the staff, by not contesting Mr. Harps' views on the matter, accepted the proposition that every sale would carry a brokerage commission paid by Transit in the amount determined by Mr. Harps. Brokerage commissions are, as is well known, related to sales prices, and commission rates have varied from time to time. Mr. Harps' estimates of the amount of commission are associated with the dates of transfer and valuations established in my preliminary findings. A different date-of-transfer finding might require a new estimate of the brokerage commission.[186] A different finding on market value (*i.e.*, imputed sale price) would very probably require a redetermination of the brokerage commission.[187] Mr. Hatfield testified that the brokerage commission would be 6 percent in every case. Mr. Harps, whose expertise in the field was admitted, whereas Mr. Hatfield's was not, applied varying rates and testified at some length on practices in the real estate business. Under cross-examination he agreed to

[186] The Commission could reach a finding on the amount of commission based on the record without the need for further evidentiary hearings.

[187] This determination which requires a finding that is within a range of reasonableness could also be made on the basis of the record.

raise his estimate of the reasonable commission rate for three properties (Brookland, Eastern and Central garages).

Mr. Bebchick vigorously contested the allowance of any brokerage fees on the basis that in actual practice Transit did not use brokers in the real estate sales it did make or the leases it entered into as lessor. He provided a witness – the former comptroller of Transit – testify to the company's practices in managing, leasing and selling real estate and cross-examined Mr. Hatfield on the subject, as did counsel for the staff. From the record thus developed one must conclude that with the exception of a listing of its General Office Building with a broker in late 1972, Transit was not in the practice of using real estate brokers, or bearing the cost of brokerage commissions when property was sold.[188]

Notwithstanding this evidence, brokerage commissions per Mr. Harps' calculations as revised on cross-examination will be allowed. The reason is that the evidence as to the company's practices, when its policy was not to sell property (Tr. 1979), is not controlling on the question of what its policy would have been otherwise, nor reflective of normal commercial practices. I believe that brokers would most certainly have been engaged to assist in the major sales program that would have been necessary to sell these properties on the dates they were transferred out of service. The use of a broker's services is the norm when large or complex sales are transacted (Tr. 1753).

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[188] Grace Street Shop and the terminal at Georgia and Eastern Avenues were sold without a commission being paid; the four properties sold to the Redevelopment Land Agency were sold, as one would expect, without the involvement of a broker or payment of a commission.

4. *Appraisal Fees.*

Appraisal fees, as estimated by Mr. Harps on cross-examination (Tr. 1754-70) will also be allowed. An appraisal is customary in connection with the sale of utility property. An appraisal is required for sales or accounting transfers subject to our Regulation 61. This Commission would undoubtedly have required an independent appraiser's value estimate to confirm the adequacy of the sale price in the case of a sale or to establish value in the case of a transfer below the line. The cost of such an appraisal would have been chargeable to the farepayers.

5. *Attorney Fees.*

Transit contends that attorney fees are a normal and usual expense of the parties to a major real estate transaction and claims an allowance in this case. B.U.F. and Mr. Bebchick disagree, in reliance on the availability of house counsel at no additional cost, and on Mr. Harps' view that the seller's interest in a transaction is typically so simple as not to require an attorney (Tr. 1734). On the other hand, there is evidence in the record that on the occasions when property was sold Transit did avail itself of the services of retained counsel expert in real estate matters (Tr. 2398-99). In my view, attorney fees would have been incurred if these transfers had been actual sales, and accordingly I accept the stipulation of the parties that attorney fees, if allowed, be calculated at 3/8ths of 1 percent of the sales price.

6. *Holding Costs and Points.*

Mr. Hatfield, the company's witness, estimated total sales expense at 10 percent of market value for every property by extrapolation from expense computations

he performed for three properties.[189] The 10 percent sales expense included, in addition to the five categories of sales expense referenced above, "holding costs" and "points", which together were estimated at 3 to 4 percent of market value.

"Holding costs" were described as the expenses incurred between the time a property is listed for sale and when it is sold, and include items such as insurance and maintenance.[190] Undoubtedly there would have been a lapse of time between a decision to sell these properties and their actual sale (Tr. 1780-87). It is true that, to paraphrase Mr. Hatfield, costs don't stop just because you decide to sell; they stop when you do sell. The question is whether such costs are allowable as a sales expense in this proceeding. I have determined that they are not for two reasons: first, as Mr. Harps put it, holding costs are an expense of ownership not an expense of sale, and would be incurred in any case;[191] second, this proceeding assumes a sale on the date of transfer below the line. Expenses before that date would have been charged to the farepayers,[192] and expenses after that date are not allowable. If I am overruled on this point, I find, on the basis of Mr. Hatfield's testimony, that holding costs are, on average, equal to 1¼ percent of market value.

"Points", *i.e.,* a retention of part of the principal of a loan by a lender, are not allowed as a sales expense. Except for Mr. Hatfield's arbitrary claim of an expense equal to 2 percent of market value for points, there is no basis in the record to determine the rate at which points were being charged by lenders on the dates in question.

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[189] See Transit Exhibits 47, 48, Tr. 240, and Protestant Exhibit 1.
[190] Tr. 241.
[191] Tr. 1734.
[192] Transit's counsel conceded as much (Tr. 1792).

In any case, points are generally paid by the purchaser not the seller (Tr. 1734).

Sales expense findings are summarized in Table III following.

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Table III

SALES EXPENSE

(1) Property	(2) Date Of Transfer	(3) Market Value	(4) I.R. Stamps	(5) D.C. Transfer Tax
Central Garage	09-30-58	$ 932,200	$ 1,025.42	
4th Street Shop	01-16-59	1,014,000	1,115.40	
Southern Carhouse	01-16-59	833,500	916.85	
Maryland Line	04-30-59	16,500	18.15	
Benning Line	04-30-59	4,800	5.28	
Northeast Carhouse	05-31-59	382,000	458.70	
Cabin John Line	01-31-60	201,500	221.65	
Georgia & Eastern Terminal	10-31-60	187,800	206.58	
14th & V Streets, N.W.	01-31-62	23,800	26.18	
13th & D Streets, N.W.	01-31-62	4,755	5.23	
Navy Yard Carhouse	06-30-63	666,500	733.15	$ 1,666.25
M Street Shop	06-30-63	976,800	1,074.58	2,442.00
Grace Street Shop	09-30-63	234,000	257.40	585.00
General Office Building	01-01-64	2,115,000	2,326.50	5,287.50
Parking Lot	01-01-64	14,900	11.44	26.00
Brookland Garage	09-11-66	816,500	898.15	2,041.25
Eastern Garage	09-11-66	946,000	1,040.60	2,365.00
Trinidad Garage	09-11-66	464,500	510.95	1,161.25
TOTALS		$9,835,055	$10,852.11	$15,574.25

(6) Settlement Charge	(7) Brokerage Commission %		(8) Appraisal Fee	(9) Attorney's Fee 3/8% of (3)	(10) Total Sales Expense Sum of (4) thru (9)
$ 25	4	$ 37,288.00	$ 1,000	$ 3,496	$ 42,834.42
25	3	30,420.00	1,250	3,803	36,613.40
25	4	33,340.00	1,250	3,126	38,657.85
25	10	1,650.00	50	62	1,805.15
25	10	480.00	50	18	578.28
25	5	19,100.00	750	1,433	21,766.70
25	6	12,090.00	2,000	756	15,092.65
25	5	9,390.00	250	704	10,575.58
25	6	1,428.00	300	89	1,868.18
25	10	475.50	50	18	573.73
25	5	33,325.00	1,000	2,499	39,248.40
25	4	39,072.00	1,250	3,663	47,526.48
25	5	11,700.00	750	878	14,195.40
25	3	63,450.00	2,500	7,931	81,520.00
25	10	1,490.00	100	56	1,708.44
25	4½	36,742.50	1,500	3,062	44,268.90
25	4½	42,570.00	1,750	3,548	51,298.60
25	5	23,225.00	1,250	1,742	27,914.20
$450		$397,236.00	$17,050	$36,884	$478,046.36

B. *Income Taxes*

No issue in this proceeding was productive of more complex, and may I say, confusing testimony. If there is a reader who seeks to be disabused of the notion that one can understand a regulatory proceeding by reviewing the record he is referred to pages 1995-2378 of the transcript.

The income tax is the largest offset to gain and so, as one would expect, the subject was explored extensively.[193]

The company's position was simplicity itself. Transit sought an income tax deduction of 28.75 percent of the net gain after sales expenses. This was represented to be the combined effect of the federal and District of Columbia capital gains taxes. Transit's witness conceded on the witness stand that there was no D.C. capital gains tax on any of the dates of transfer found by the hearing officer,[194] and that if the properties had been sold on the dates of transfer only the federal capital gains tax would have applied. Thus, a tax liability of 25 percent of the net gain would have been the maximum incurrable had the properties been sold on the dates of transfer.

The staff's theory of the case purported to be a more precise reflection of the tax consequences of sales at the market values and on the dates of transfer found by the hearing officer. Developed and presented by a tax partner of the accounting firm which served as expert advisor to and witness for the staff throughout these

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[193] No one addressed the question whether the gain would have been recognized for tax purposes if Transit had been required contemporaneously with the transfer to credit it to the farepayers.

[194] The District of Columbia capital gains tax was enacted by Public Law 91-106, October 31, 1969, 83 Stat. 176, and applied to taxable years from 1969 onward. Thus, if a D.C. capital gains tax applies to any property being considered in this case it is only to the Trinidad Garage and then only if its date of transfer is deemed to be its date of sale, May 8, 1970. Of course, when these properties are actually sold, they will be subject to the D.C. capital gains tax.

proceedings, it posited an actual sale of each property as of the date of transfer and deducted the tax basis[195] in the property and the sales expense to arrive at a hypothetical taxable gain.

In calculating Transit's assumed tax liability the staff witness first adjusted the reported taxable income to exlude the gains from actual sales, since none of these sales occurred in the same year as the date of transfer[196] or at a price equal to market value as found by the hearing officer. Then the hypothetical gain on all the assumed sales of transferred properties was added back as of the year of transfer.[197] Then these hypothetical gains were taken into Transit's income for the years in question—*i.e.,* hypothetical capital gains were combined with the actual operating earnings or losses. Transit's taxable income was recalculated on this basis and tax rates appli-

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[195] It is very important to be aware that the gain for tax purposes is not equal to the appreciation in value as determined in accordance with the Court's directives. Both equate market value on the date of transfer with a sale price. Value appreciation for the purpose of this proceeding has been calculated by subtracting the unrecovered investment (net book value per regulatory books) from market value, whereas gain for tax purposes is calculated by subtracting the tax basis from market value. Tax basis does not equal unrecovered investment because a different method was used to allocate Transit's purchase price to assets for regulatory purposes than was used for tax purposes, and because different rates of depreciation were used for tax purposes than for regulatory purposes. Tax basis became an issue and so I have made findings as to tax basis, see Table IV at the end of this section.

[196] The differences are as follows:

Property	Year of Sale	Year of Transfer
Cabin John	1961	1960
Georgia & Eastern	1962	1960
Trinidad Garage	1970	1966
Substation (14th and V Streets)	1971	1962

[197] Recognition of the gain realized on the sale of the 4th Street Shop and Southern Carhouse to RLA in 1959 was deferred for tax purposes by Transit, but recognized as of 1959 for purposes of calculating tax expense in this proceeding.

cable to the assumed property transactions were developed accordingly.

The staff's elaborate reconstruction also took account of the fact that Transit incurred operating losses in every year from 1966 onward. To illustrate an effect of income recalculation by the staff method, assume a gain of $250,000 from a property disposition in a year in which operating losses exceeded $250,000. In this case the gain would be offset against the loss and no tax would be due. Arguably, therefore, the entire gain should be credited to the farepayers without an offset for taxes. The accounting gets more complex when tax loss carry-backs and carry-forwards are taken into consideration.[198]

In 1964 Transit had taxable income. Thus, a property disposition in that year would have been taxable at the marginal capital gains rate in the 1964 tax filing. Because of operating losses in 1966, the 1964 tax return could later be reopened and the 1966 loss carried back to offset 1964 income. Such carry-back losses may be used to offset not only operating income, but also capital gains on property dispositions. Assuming a large enough loss carry-back to offset the gain entirely, the capital gain would not have been taxable. Therefore, the argument flows, the farepayers should receive the benefit of the entire 1964 capital gain without a tax expense offset.[199]

The complexity of the matter deepens when the hypothetical capital gains in 1966 are used first to offset operating losses in that year, thereby reducing the amount available for carry-back to 1963, '64 and '65, thereby further distorting the assumed income, and income taxes, in those years. The intricacy of the problem and the

[198] Transit's 1966 operating losses were carried-back to offset all or part of income in 1963, 1964, and 1965 in the staff's calculations.

[199] The irony of a result that losses in operations generate higher benefits to the farepayers is too juicy to go unremarked.

arcanity of its solution is further increased when the effect of the investment tax credit is incorporated, to say nothing of depreciation recapture and the effect of rental income.

The staff's approach demonstrates that with the benefit of hindsight and the assumption of certain dates of transfer and market values for those dates it is possible, while taking account of all the inter-relationships described above, to approximate the actual taxes that ". . . would have been deducted from Transit's profit if the assets had been sold outright instead of being moved into nonoperating status."[200] And this the staff's witness did. The resultant tax was computed at $1,649,946 (Staff Exhibit 29, Schedule 10; Tr. 2042), later increased to $1,662,413 to take account of differences in selling expenses from those originally estimated by the witness (Staff Exhibit 30, and Staff Exhibit 31, Schedule 10).[201]

The staff witness did not carry this elaborate year-by-year reconstruction of the company's tax liability onward to a calculation of the tax expense to be associated with each property, nor, *a fortiori,* as between the land and depreciable portions of each property. Only a gross increment in taxes over those actually paid by Transit in the years in question was calculated. This incremental tax expense of $1,662,413 was offered as the appropri-

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[200] *DCC-I, supra,* n.1(a) at 822 n.343.

[201] The staff also offered (as Staff Exhibit 32) an alternative computation in which the 4th Street Shop and Southern Carhouse were excluded. Neither the gain on those sales nor an imputed tax was recognized. The resulting tax offset was $1,260,345 (Staff Exhibit 32, Schedule 10) but this offset was to be taken against a total net gain that did not include the gain imputed to those properties. I have understood the staff's position to be that if gain on those properties is recognized in these proceedings, a tax offset should be allowed, even though no tax on that gain has been paid as yet. The recognition of gain has been deferred under provisions of the Internal Revenue Code allowing deferral when a property disposition results from a condemnation or a sale under threat of condemnation (Tr. 2049-55).

ate deduction from the total net gain after sales expenses. This left unanswered the question of how to allocate the tax expense among the 18 properties and to their depreciable and non-depreciable components. The method of allocation can be significant—as protestant Bebchick pointed out—because under the Court's mandates our award of gain to the farepayers is to be conducted *seriatim:* first, *Bebchick-II,* then *DCC-I,* then *DCC-II.* Insofar as depreciation recapture and application of limitations on the investment tax credit come into play, the allocated split between land and buildings might become important in determining whether the depreciation deficiency (*Bebchick-II*) is recaptured in full.

Protestant Bebchick attacked the witness' approach vigorously on cross-examination, and, as a result, the record now contains two alternative calculations of tax expense as it relates to the depreciable elements involved in *Bebchick-II* (Staff Exhibit 33; Protestant Exhibit 5, revised). Protestant Bebchick also testified, over objection, to his own theory of the case, which, if adopted, would change the rate of tax expense applicable to the depreciable components of the Bebchick properties from the 25.84 percent rate developed by the staff witness to 19.92 percent, thereby reducing tax expense from $579,528 to $446,434, a difference of $133,094. This $133,094 is then available to increase the amount of net gain available to offset the depreciation deficiency.[202]

[202] This is important only if the net gain after taxes on these properties is reduced to less than the depreciation deficiency. It should be emphasized that the total of tax expense offset as determined by the staff is not altered by the Bebchick attack on the staff's allocation method. Therefore, an apparent shortfall in overcoming the depreciation deficiency in *Bebchick-II* may be made up by commensurately larger benefits to the farepayers in the *Democratic Central* cases. Only if the entire remaining net gain is not absorbed in those cases does a shortfall in *Bebchick-II* redound to the disadvantage of the farepayers—in other words, if the total pot

I have discussed the theory of tax expense as developed by the staff, with the Bebchick variant, to make it clear that I do understand it. I would not want anyone to conclude that its rejection in this report is born of confusion or frustration . . . although there were days when that might have been the reason.

I have determined to allow an offset for income tax expense equivalent to 25 percent of the taxable gain that would have been realized on these properties if sold on the date of transfer at their market value. This requires a finding of tax basis as of those dates. That finding is attached as Appendix D. No consideration will be given to the company's operating results or net operating loss carry-backs or carry-forwards, nor to tax savings attributable to the investment tax credit, nor to depreciation recapture or rental activity, both of which are *de minimis* in effect and hence not developed for the record.

I reach this conclusion because the standard regulatory treatment of prospective income taxes is to recognize them at the marginal rate. If the Commission had timely recognized value appreciation as an offset to the depreciation deficiency or to fare increases we would have done so in an order that spoke prospectively. In doing so we would have presumed profitable operations, otherwise we would have denied the validity of our fare orders to offer an opportunity for earnings. Therefore, we would have assumed hypothetical sales by a profit-

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can be emptied the farepayers have received the entire benefit potential of the Court's properties decisions, albeit in different contexts. Also, credits not used in *Bebchick-II* are available to benefit farepayers in *DCC-I.* As it turns out, this change is of no moment. As protestant Bebchick stated, under any theory of tax and sales expense there is enough net gain on the depreciable portion of the properties involved in *Bebchick-II* to offset the entire $1,058,000 of depreciation deficiency charged to the Riders' Fund. The point therefore becomes significant only if some of the properties are eliminated from consideration on one or more of the theories advanced by Transit and discussed *infra* Part III.

able company taxable at the marginal rate then in effect—25 percent.[203] [204] If and when Transit's remaining properties are sold it will be under circumstances not now foreseeable. In no event will the 1966-1973 operating losses and resulting tax credits have an impact on the taxes payable as a result of the actual sale of these properties; the company's tax liability for all years through 1972 has been settled and cannot be reopened. If part of our obligation is, as I understand it to be, to keep the investors whole, it is clearly not in order to assume tax consequences in the context of this case that are detrimental to the investors when there is no chance of their occurring.

Net gain, gross gain less sales and tax expenses, is summarized in Table V following.

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[203] This finding is based on a *nunc pro tunc* view of a timely order, prospective in effect. A prospective order entered as of June 1970 and any date thereafter might properly recognize the 3.75 percent District of Columbia capital gains tax, since it will be payable on the portion of gain recognized here for all the unsold properties when they are finally sold.

[204] A possible exception might be made for the properties actually sold, where the related capital gains tax can be determined from Transit's records. But none of these properties was sold in the year it was transferred out of utility service, therefore, I have applied the same tax expense treatment to them.

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Table IV

TAX EXPENSE

(1) Property	(2) Market Value (Table II)	(3) Tax Basis (Staff Ex. 34)
Central Garage		
Land	$ 322,000	$ 23,010
Bldg	610,200	115,433
Total	932,200	138,443
Fourth Street Shop		
Land	1,014,000	58,272
Bldg	-0-	203,251
Total	1,014,000	261,523
Southern Carhouse		
Land	833,500	47,867
Bldg	-0-	62,433
Total	833,500	110,300
Maryland Line Right-of-Way	16,500	1,163
Benning Line Right-of-Way	4,800	5,122
Northeast Carhouse		
Land	246,000	43,069
Bldg	136,000	31,564
Total	382,000	74,633
Cabin John Right-of-Way	201,500	89,906
Georgia and Eastern Terminal		
Land	187,800	37,168
Bldg	-0-	4,864
Total	187,800	42,032
14th and V Streets Substation		
Land	16,700	10,765
Bldg	7,100	3,547
Total	23,800	-14,312
13th and D Streets Storage Yard	4,755	1,163
Navy Yard Carhouse		
Land	427,500	126,964
Bldg	239,000	48,562
Total	666,500	175,526
M Street Shop		
Land	660,000	78,390
Bldg	316,800	55,657
Total	976,800	134,047

(4) Sales Expense Table III (See Note)	(5) Taxable Gain (2)–[(3)+(4)]	(6) Tax Expense (5) × .25
$ 14,778	$ 284,212	$ 71,053
28,056	466,711	116,678
42,834	750,923	187,731
12,631	943,097	235,774
23,982	(227,233)	(56,808)
36,613	715,864	178,966
13,337	772,296	193,074
25,321	(87,754)	(21,939)
38,658	684,542	171,135
1,805	13,532	3,383
578	(900)	(225)
7,510	195,421	48,855
14,257	90,197	22,545
21,767	285,600	71,400
15,093	96,501	24,125
3,649	146,983	36,746
6,927	(11,791)	(2,948)
10,576	135,192	33,798
644	5,291	1,323
1,224	2,329	582
1,868	7,620	1,905
574	3,018	754
13,541	286,995	71,749
25,707	164,731	41,183
39,248	451,726	112,932
16,396	565,214	141,304
31,130	230,013	57,503
47,526	795,227	198,807

TABLE IV

TAX EXPENSE (Continued)

(1) Property	(2) Market Value (Table II)	(3) Tax Basis (Staff Ex. 34)
Grace Street Shop		
Land	145,500	13,459
Bldg.	88,500	30,241
Total	234,000	43,700
General Office Building		
Land	402,000	52,576
Bldg.	1,713,000	567,161
Total	2,115,000	619,737
Parking Lot	14,900	692
Brookland Garage		
Land	377,000	123,505
Bldg.	439,500	68,221
Total	816,500	191,726
Eastern Garage		
Land	584,000	89,200
Bldg.	362,000	48,562
Total	946,000	137,762
Trinidad Garage		
Land	270,500	48,529
Bldg.	194,000	39,581
Total	464,500	88,110
GRAND TOTAL	$9,835,055	$2,129,897

Note: Sales Expense, developed on a property-by-property basis in Table III, has been prorated between land and building in accordance with the ratio of the market value of each to the market value of the total property.

(4) Sales Expense Table III (See Note)	(5) Taxable Gain (2)–[(3) + (4)]	(6) Tax Expense (5) × .2875
4,897	127,144	31,786
9,298	48,961	12,240
14,195	176,105	44,026
28,124	321,300	80,325
53,396	1,092,443	273,111
81,520	1,413,743	353,436
1,708	12,500	3,125
15,273	238,222	59,555
28,996	342,283	85,571
44,269	580,505	145,126
17,698	477,102	119,276
33,601	279,837	69,959
51,299	756,939	189,235
9,630	212,341	53,085
18,284	136,135	34,034
27,914	348,476	87,119
$478,045	$7,227,113	$1,806,778

Table V

SUMMARY OF FINDINGS

(1) Property	(2) Date of Transfer Market Value (Table II)	(3) Unrecovered Investment (Table I)	(4) Gross Gain (2)–(3)
Central Garage			
Land	$ 322,000	$ 19,315	$302,685
Bldg	610,200	212,172	398,028
Total	932,200	231,487	700,713
Fourth Street Shop			
Land	1,014,000	48,912	965,088
Bldg	–0–	354,389	(354,389)
Total	1,014,000	403,301	610,699
Southern Carhouse			
Land	833,500	40,177	793,323
Bldg	–0–	110,962	(110,962)
Total	833,500	151,139	682,361
Maryland Line Right-of-Way	16,500	4,301	12,199
Benning Line Right-of-Way	4,800	974	3,826
Northeast Carhouse			
Land	246,000	36,151	209,849
Bldg	136,000	66,472	69,528
Total	382,000	102,623	314,377
Cabin John Right-of-Way	201,500	96,237	105,263
Georgia and Eastern Terminal			
Land	187,800	31,199	156,601
Bldg	–0–	5,986	(5,986)
Total	187,800	37,185	150,615
14th and V Streets Substation			
Land	16,700	9,038	7,662
Bldg	7,100	474	6,626
Total	23,800	9,512	14,288
13th and D Streets Storage Yard.	4,755	976	3,779
Navy Yard Carhouse			
Land	427,500	106,562	320,938
Bldg	239,000	5,445	233,555
Total	666,500	112,007	554,493
M Street Shop			
Land	660,000	65,793	594,207
Bldg	316,800	10,081	306,719
Total	976,800	75,874	900,926

(5) Sales Expenses (Table III)	(6) Net Gain Before Taxes (4)–(5)	(7) Tax Expense (Table IV)	(8) Net Gain (6)–(7)
$14,778	$287,907	$ 71,053	$216,854
28,056	369,972	116,678	253,294
42,834	657,879	187,731	470,148
12,631	952,457	235,774	716,683
23,982	(378,371)	(56,808)	(321,563)
36,613	574,086	178,966	395,120
13,337	779,986	193,074	586,912
25,321	(136,283)	(21,939)	(114,344)
38,658	643,703	171,135	472,568
1,805	10,394	3,383	7,011
578	3,248	(225)	3,473
7,510	202,339	48,855	153,484
14,257	55,271	22,545	32,726
21,767	257,610	71,400	186,210
15,093	90,170	24,125	66,045
3,649	152,952	36,746	116,206
6,927	(12,913)	(2,948)	(9,965)
10,576	140,039	33,798	106,241
644	7,018	1,323	5,695
1,224	5,402	582	4,820
1,868	12,420	1,905	10,515
574	3,205	754	2,451
13,541	307,397	71,749	235,648
25,707	207,848	41,183	166,665
39,248	515,245	112,932	402,313
16,396	577,811	141,304	436,507
31,130	275,589	57,503	218,086
47,526	853,400	198,807	654,593

TABLE V

SUMMARY OF FINDINGS (Continued)

(1) Property	(2) Date of Transfer Market Value (Table II)	(3) Unrecovered Investment (Table I)	(4) Gross Gain (2)–(3)
Grace Street Shop			
Land	145,500	11,294	134,206
Bldg	88,500	20,906	67,594
Total	234,000	32,200	201,800
General Office Building			
Land	402,000	44,127	357,873
Bldg	1,713,000	795,275	917,725
Total	2,115,000	839,402	1,275,598
Parking Lot	14,900	579	14,321
Brookland Garage			
Land	377,000	103,659	273,341
Bldg	439,500	–0–	439,500
Total	816,500	103,659	712,841
Eastern Garage			
Land	584,000	74,867	509,133
Bldg	362,000	–0–	362,000
Total	946,000	74,867	871,133
Trinidad Garage			
Land	270,500	40,733	229,767
Bldg	194,000	–0–	194,000
Total	464,500	40,733	423,767
Total Land	5,728,955	734,894	4,994,061
Total Buildings	4,106,100	1,582,162	2,523,938
GRAND TOTALS	$9,835,055	$2,317,056	$7,517,999

* By stipulation of the parties, accepted by the ~~hearing officer~~, the net gain after all expenses and taxes on the General Office Building is subject to an equitable offset in the amount of $282,690 for purposes of computing restitution to the farepayers in the *Democratic Central* cases. See discussion at pages 49 to 52 of this report.

(5) Sales Expenses (Table III)	(6) Net Gain Before Taxes (4)–(5)	(7) Tax Expense (Table IV)	(8) Net Gain (6)–(7)
4,897	129,309	31,786	97,523
9,298	58,296	12,240	46,056
14,195	187,605	44,026	143,579
28,124	329,749	80,325	249,424
53,396	864,329	273,111	591,218
81,520	1,194,078	353,436	840,642*
1,708	12,613	3,125	9,488
15,273	258,068	59,555	198,513
28,996	410,504	85,571	324,933
44,269	668,572	145,126	523,446
17,698	491,435	119,276	372,159
33,601	328,399	69,959	258,440
51,299	819,834	189,235	630,599
9,630	220,137	53,085	167,052
18,284	175,716	34,034	141,682
27,914	395,853	87,119	308,734
177,866	4,816,195	1,175,067	3,641,128
300,179	2,223,759	631,711	1,592,048
$478,045	$7,039,954	$1,806,778	$5,233,176*

VII. *ISSUES PECULIAR TO BEBCHICK-II*

The property appreciation issue in *Bebchick-II* stands on somewhat different footing than it does in the *Democratic Central* cases.

By Order No. 381[205] the Commission found a deficiency in Transit's reserve for depreciation as of June 30, 1963.[206] The Commission dealt with the deficiency in the fare case conducted in Docket No. 101 (Order No. 564)[207] not by raising depreciation rates as is sometimes done, but by increasing the reserve through charges to other accounts. The "depreciation deficiency" as it has come to be called was split into two parts. As to the first, in the amount of $806,168, the Commission deemed it appropriate to charge the farepayers for this deficiency and ordered a levy in that amount to be made against the Riders' Fund. The balance, amounting to $252,688[208] was deemed related to two properties (presumably, Grace Street Shop and the General Office Building) which had been removed from utility service after August 15, 1963, and the related depreciation deficiency was charged against a below-the-line account (in effect to the investors). On appeal in *Williams* v. *WMATC*[209] the Court held that the lesser sum should be treated like the larger—*i.e.*, charged against the farepayers, by a debit to the Riders' Fund if necessary.[210]

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[205] *Supra*, n.11.

[206] The deficiency is often related to presumed under-accruals on streetcar properties that were to be retired from utility service before their physical usefulness had ended in pursuit of the franchise-mandated streetcar-to-bus conversion program. For this reason the depreciation deficiency reference date is often said to be August 15, 1963, the date that conversion was to be accomplished.

[207] *Supra*, n.12.

[208] Actually the amount mentioned in Order No. 564 is $293,459, but this was reduced by $40,771 by elimination of nonutility property (see *Williams, supra,* n.14 at 957).

[209] *Supra*, n.14.

[210] *Ibid.* at 958.

Hearing Officer Decision

In reaching its decision in *Williams* the Court reviewed the equitable considerations involved in charging the farepayers for the depreciation deficiency if the investors had been recompensed for the shortfall by some other means, such as an excess of actual earnings over the allowed return while the properties were in service. The matter was returned to the Commission for a determination on the latter point, with directions that the Riders' Fund not be charged if other compensation had been earned.[211]

On remand protestant Bebchick urged the Commission not to limit its consideration to excess earnings as a source of recompense, but to look also to in-service appreciation in the value of the depreciable portions of six of Transit's properties (Central Garage, Navy Yard Carhouse, M Street Shop and Northeastern Garage, which had been retired from utility service before August 15, 1963, and Grace Street Shop and General Office Building, which had been transferred below the line in September 1963 and January 1964, respectively).

The Commission declined, believing that it was limited by *Williams* to consideration of earnings in excess of the authorized rate. Finding that there had been no such excess earnings, the Commission let stand the prior charge to the Riders' Fund of $806,168.[212]

In *Bebchick-II* the Court reversed once again, and directed the Commission to look to appreciation in value of the depreciable portion of the six properties as a source of compensation to Transit's investors for the depreciation undercharges.[213]

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[211] *Supra,* n.14 at 958.

[212] Order No. 981, *supra,* n.13 at 18. Following the mandate of the Court, the additional $252,688 should also have been charged to the Riders' Fund, but no such directive appears in Order No. 981.

[213] How and why these six properties, and no other, are considered in this case is shrouded in the mist of history. They were the properties advanced for consideration by the protestant and the le-

Transit has attempted to exclude some of these properties from consideration. Under one theory—discussed and disposed of by the Commission in Order No. 1356—the statute of limitations bars consideration of any property transferred more than three years before January 26, 1966, when Order No. 564 was issued. This would exclude two properties, Central Garage and Northeast Garage, which were transferred in the late '50's. The statute of limitations bar was rejected by the Commission in Order No. 1356.

The second string to Transit's bow is the argument that only appreciation in value through August 15, 1963, may be considered. If accepted this argument would relate only to the Grace Street Shop and the General Office Building. Grace Street Shop was transferred out of service on September 30, 1963, six weeks after the August 15 presumptive cut-off date, and the General Office Building on January 1, 1964, some 12 or 13 weeks later. The difference in values on dates so close together would be minimal one would suppose.[214] In any case the difference would be available for credit to the farepayers in *DCC-I.*[215] I find no merit to Transit's argument, which rests on selectively quoted language from the *Bebchick-II* opinion.

Transit, in this as in so many of its arguments, asks too much or reaches a conclusion which is a non-sequitur. The point, as I have understood it, is that in offsetting the depreciation deficiency with in-service appreciation, the Commission must match time periods. The depreciation deficiency accrued over many years,

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gitimacy of the relationship is assumed by the Court (see *supra*, n.1(c) at 869 n.85) and the Commission (see Order No. 1356).

[214] One *must* suppose, for Transit produced no evidence of August 15, 1963, market value of these properties, as was its obligation.

[215] See Application of Proceeds, *infra*.

some in the pre-D.C Transit era; it was fixed and determined in amount as of August 15, 1963.[216] It follows from this—if I understand Transit's logic—that the gain to be offset against the deficiency is limited to the increase in value that occurred during the same time period, *i.e.,* from the date the properties were dedicated to utility service until August 15, 1963.

No support for this position is to be found in the Court's language in either *Williams*[217] or, more importantly, *Bebchick-II.* In making the comparison between book and market values to be used in ascertaining gain, the Court refers to the properties' market value "at the time of transfer"[218] not "at August 15, 1963," or "within three years of Order No. 564" as Transit would have it. Furthermore, although it is true, as the Court puts it, that the ". . . depreciation deficiency . . . should have been recovered prior to August, 1963"[219] the fact that it was not does not limit corrective action to that which could have been taken by that date. As a matter of fact, depreciation deficiencies are ordinarily corrected after the fact.

The next issue is whether the entire $1,058,856 of depreciation deficiency is subject to offset by property appreciation. It is Transit's view that our examination is limited to the $252,688 found in the *Williams* case to be properly chargeable to the Riders' Fund. This is an erroneous view of the mandate of *Williams* and *Bebchick-II.* Recompense to the investors from property

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[216] Actually the date on which the deficiency was determined was June 30, 1963, (see Order No. 381) but the parties, the Commission and the Court have consistently linked it to the streetcar-to-bus conversion program which had a target completion date of August 15, 1963, under Transit's franchise.

[217] *Supra,* n.14.

[218] *Supra,* n.1(c) at 871.

[219] *Ibid.* at 871.

appreciation extends to the entire $1,058,056, both the $806,168 charged to the Riders' Fund and the $252,688 not so charged.

In discussing the treatment of the depreciation deficiency in *Bebchick-II,* the Court states:

> In *Williams* we held, so far as now pertinent, that the smaller sum ($252,688) should be treated like the larger ($806,168), and that Transit's investors should have the benefit of a debiting of the court-ordered reserve only to the extent that they had not already received compensation for the under-accrued depreciation. We directed the Commission, on remand of Order No. 564, to "determine the extent, if any, to which Transit's investors may have already been repaid by excesses of past actual earnings over a fair margin of return while the properties in question were in service." We authorized the Commission to "permit Transit to retain any portion of the total amount of under-accruals of which its investors have not been compensated in the form of past earnings in excess of fair returns." And we specified that "[a]ny amounts permitted by Order No. 564 to be withdrawn from the court-ordered reserve for which Transit's investors have already been so compensated shall be restored to the reserve."[220]

and

> We hold . . . that the depreciation reserve deficiency may have been wholly wiped out through the transfer out of operation of these properties no longer used in the transportation business.[221]

and

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[220] *Supra,* n.1(c) at 869.

[221] *Ibid* at 869.

> The theory of the *Williams* remand on this point was that the riders' fund, being itself an equitable creation, should not be debited with the depreciation deficiency unless it was equitable to do so, and that it would not be fair and equitable if Transit's owners had already been compensated or reimbursed for that deficiency in some other form.[222]

and

> . . . the investors were only entitled to recover the deficiency to the extent that had not already been reimbursed.[223]

and see footnote 137,[224] where the Court in discussing the depreciation deficiency equates it to $1,058,856 (*i.e.*, $806,168 plus $252,688) stating that all parties agree that this is the amount. In every instance the Court discusses the depreciation deficiency as a whole.

Against all these indications that the Court was ordering a value-appreciation offset against the entire depreciation deficiency, stands the language in the "Disposition" section of the Court's opinion:

> The Commission will also reexamine the allowance of the deficiency of $252,688 in Transit's depreciation reserve and the corresponding debit to the riders' fund;[225] and must then determine whether Transit's investors were compensated for *that* deficiency by an excess of market value

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[222] *Ibid.* at 870.
[223] *Ibid.* at 871.
[224] *Ibid.* at 875.
[225] This debit was never actually made, *supra,* n.212.

> of depreciable properties transferred from above to below the line and make adjustments to the fund accordingly.[226] (emphasis supplied)

This language only serves to point out that the $252,688 component of the depreciation deficiency must receive the same treatment as the $806,168 component, as to which offset from gains from other sources had already been ordered in *Williams. Bebchick-II* did no more than direct us to look beyond excess earnings to property appreciation for gains to offset the depreciation deficiency.

The total net gain on the six *Bebchick-II* properties is a total of $1,308,045 as shown in Table VI, which is more than sufficient to cover the total depreciation deficiency of $1,058,856. Therefore, Transit should be directed to restore the $806,168 already charged to the Riders' Fund by making a cash deposit in the same amount. As to the $252,688 remainder of the depreciation deficiency, it is found that Transit's investors were compensated for this under-recovery of depreciation by appreciation in value of the six properties involved in this case. The investors are therefore entitled, as against the farepayers, to retain $252,688 of this value appreciation. Accordingly, the Riders' Fund should not be charged with the $252,688 of heretofore unrecovered depreciation deficiency, and $252,688 of the in-service value appreciation should be allocated to Transit's investors. After deducting the $806,168 and $252,688 from the net gain found on the depreciable portions of the six properties, there remains $249,189 to be applied as directed in the *Democratic Central* cases.

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[226] *Supra,* n.1(c) at 880.

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Hearing Officer Decision

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Table VI

NET GAINS ON DEPRECIABLE PROPERTIES AVAILABLE AS OFFSET TO DEPRECIATION DEFICIENCY

(1) Property (Building Only)	(2) Market Value (Table II)	(3) Unrecovered Investment (Table I)	(4) Gross Gain (2)–(3)
Central Garage	$ 610,200	$ 212,172	$ 398,028
Northeast Carhouse	136,000	66,472	69,528
Navy Yard Carhouse	239,000	5,445	233,555
M Street Shop	316,800	10,081	306,719
Grace Street Shop	88,500	20,906	67,594
General Office Building	1,713,000	795,275	917,725
Totals	$3,103,500	$1,110,351	$1,993,149

(5) Sales Expense (Table IV)	(6) Net Gain Before Taxes (4)–(5)	(7) Taxes (Table IV)	(8) Net Gain (6)–(7)
$ 28,056	$ 369,972	$116,678	$ 253,294
14,257	55,271	22,545	32,726
25,707	207,848	41,183	166,665
31,130	275,589	57,503	218,086
9,298	58,296	12,240	46,056
53,396	864,329	273,111	591,218
$161,844	$1,831,305	$523,260	$1,308,045

VIII. *ISSUES PECULIAR TO DCC-I*

This case involves our Order No. 773,[227] an order upheld in every respect save one, [228] which was the Commission's failure to credit the appreciation in value of the transferred properties to the farepayers when setting the fares prescribed by that order.[229] The amount of appreciation in value to be accounted for in *DCC-I* is $4,174,320.[230] This is the amount ". . . which should have been credited to the riders when the fares prescribed by Order No. 773 were set."[231] I recommend, therefore, that $4,174,320 be credited to the Riders' Fund.

A credit, of course, is a bookkeeping entry. If the credit had been made in 1968 when the fares were set, but never amortized, it would remain today on Transit's books as a liability to the farepayers.[232] This is, in practical effect, the situation today since the credit will first be made in this proceeding. The question posed is whether all or only part of this liability is to be funded and disbursed for the benefit of the farepayers.

Transit reads the Court's opinion in *DCC-I* in a way which would limit the farepayers' recovery by reopening the question of equities between the company and its ridership. In brief, Transit argues that the value appreciation should be applied first to make up shortfalls in earned return versus authorized earnings under Order

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[227] *Supra*, n.35.

[228] *Supra*, n.1(f).

[229] *Supra*, n.1(a) at 827.

[230] That is, the total net gain from all the properties of $5,233,176 less the $1,058,856 pre-empted by *Bebchick-II*.

[231] *Supra*, n.1(a) at 827.

[232] If the Commission had made the credit in 1968 it probably would have provided for its amortization over a period of time (probably covering the effective dates of several fare orders) in order not to reduce cash flow below operating and debt service requirements.

No. 773 and subsequent rate orders. This theory is argued by counsel (Tr. 1022), presented in company witness Hatfield's testimony (Tr. 1905-H), and calculated in Transit Exhibits 29, 30, 49-54, which were admitted into the record only so Transit could renew its argument to the Commission and the Court (Tr. 1885).

> I conclude that when the Court said:
>
> Thus, restitution of the gain to the riders has the automatic effect of reducing the fares collected during the operative period of Order No. 773 to the level of reasonable return to which Transit was entitled.[233]

it meant that the operating results under Order No. 773, disappointing though they were, shall be left as is, without amelioration of the shortfall in earnings by credits stemming from the increase in value of real estate, particularly if such a credit were given precedence over the restitution to farepayers directed by the Court. To do otherwise would result in the farepayers having borne not only the increased fares established in Order No. 773, but also to serve as guarantors of Transit's authorized return by forfeiture of the property value appreciation which the Court has decreed is theirs. Therefore, I find that there should be no offset against the restitution due the farepayers for increased fares collected while Order No. 773 was in effect.

Order No. 773 was in effect for only 277 days (from January 28, 1968, to October 31, 1968) or 76 percent of a year. It was superseded by Order No. 882[234] on October 31, 1968. The increase in Transit's revenues contem-

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[233] *Supra*, n.1(a) at 827.

[234] (WMATC, unreported) October 29, 1968.

plated by Order No. 773 was $972,000 per year.[235] Assuming it was operative in those terms the increased fares collected during the 76 percent of a year that it was in effect were $738,720. A credit of $738,720 to revenues (or a reduction in revenue deductions) in the original proceeding in this amount would have obviated the need for a fare increase, and fares could have remained at the pre-existing level which had been found just and reasonable in the last preceding fare order.[236] To have increased the credit to the farepayers beyond the $738,720 level for the period that Order No. 773 was in effect would have required a reduction in fares if Transit was not to enjoy excess earnings. I do not understand the Court to have indicated that the entire available credit of $4,174,320 could be amortized during operations under Order No. 773.[237] To charge the entire $4,174,320 – a non-cash item – against Order No. 773 operations would have put the company in an impossible cash position and surely have brought service to a halt in very short order, a result that is difficult to equate with responsible regulation in the public interest, to say the least. So, if the result required by *DCC-I* had been reached in the first instance, I believe the Commission would have scheduled amortization of the credit over some reasonable period of time – say, at the rate of $972,000 per year which would have ameliorated the adverse effect on cash flow, and allowed fares under Order No. 773 to be held level. On that basis, some $738,720 of the $4,174,320 credit would have been amortized while Order No. 773 was in effect, and the

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[235] Order No. 773, (WMATC, unreported) January 26, 1968, at 48.

[236] Order No. 684, (WMATC, unreported) March 13, 1967.

[237] However, the Court did require that the entire amount be credited on the effective date of Order No. 773, *supra*, n.1(a) at 827.

balance, or most of it, would have been amortized during Transit's remaining life as a public utility – the principle having been established.

Now, post-1973, Transit is no longer an operating utility in need of cash flow to maintain operations, and no adverse effect on a public service will result from a charge of the full $4,174,320 all at once, even though the levy would probably have been gradual if it had commenced in 1968 as it should have. The fact is, the Court has decreed that all appreciation in property values belongs to the farepayers, and they have not yet received it. The liability will be established in a fixed amount as the result of this proceeding. It should be paid in full as soon as possible, and I so recommend.

> On the other hand:
>
> Ordinarily . . . the proper disposition on setting aside a rate increase unlawfully ordered by the Commission would be to compel the regulated company to restore the entire difference between the higher fares collected under the invalid order and the amount it would have received from the fare schedule previously in effect, . . .[238]

which suggests that the maximum restitution available to the farepayers is the amount of increased collections under the order which has been invalidated or, in this case, $738,720. Order No. 882[239] and its successor, Order No. 984[240] were not appealed, or, if appealed were upheld with respect to this remedy.[241] In any case, the issue of reducing or eliminating the increase in fares by offsets for property appreciation was not raised in those

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[238] *DCC-I, supra*, n.1(a) at 825.
[239] *Supra*, n.234.
[240] (WMATC, unreported) October 24, 1969.
[241] *Supra*, n.1(d).

cases.[242] It seems impermissible therefore to offset those increases – over and above Order No. 773 levels – by credits for property appreciation. It should be noted that the revenue requirement and fares established in Order No. 773 were never reduced. The later fare orders built on the base established in Order No. 773 and, in that sense, Order No. 773 was operative throughout Transit's life as a public utility as the foundation upon which all subsequent fare orders were built. Order Nos. 882, 984, and 1052 may be viewed as incremental to Order No. 773.

Therefore, I conclude that almost five years' operations[243] at the Order No. 773 level are covered by the Court's restitution mandate. If restitution is limited in amount to that necessary to cover the level of increase in fares established by Order No. 773 – namely $972,000 per year – some $4,820,000 is payable to cover the almost five-year period involved. The $4,174,320 amount of restitution found in *DCC-I* is less than the $4,820,000 amount which would have been amortized if the Commission had considered the issue of property appreciation in setting fares in Order Nos. 773, 882, and 984. Therefore, the entire balance is due and payable.

IX. *ISSUES PECULIAR TO DCC-II*

The amount to be credited the farepayers in this proceeding is the net gain in the value of Transit's land while in utility service ($3,641,128)[244] to the extent not exhausted by the restitution requirement of *DCC-I*.[245]

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[242] To the contrary in the next fare case which resulted in Order No. 1052 and *DCC-II*. This is discussed in the next section of the report.

[243] January 28, 1968, when Order No. 773 took effect to January 13, 1973, when utility operations ceased.

[244] See Table V.

[245] *Supra*, n.1(e) at 913.

In Section VIII, *supra*, relating to *DCC-I*, I recommend restitution to the farepayers, under two theories of that case, of amounts that exhaust the entire net gain from all the properties involved in these proceedings.[246] Therefore, there is no restitution to be made in *DCC-II*.

On the other hand, restitution in *DCC-I* may be limited to some lesser amount than I have recommended. In that case, I recommend that the *DCC-I* restitution be levied first against the net gains on depreciable property ($533,192)[247] until those are exhausted before it attaches to net gains on land. The idea, of course, is to preserve the gain on land to which the farepayers are entitled in *DCC-II* where the source of restitution is limited to gains on land.

The maximum restitution to which the farepayers are entitled in *DCC-II* is $13,890,144, measured by the annual increase in revenues granted in Order No. 1052[248] ($5,533,922) times the number of years the order was if effect (2.51).[249] This will exhaust the maximum credit available for that purpose.

X. *REALIZATION OF RESTITUTION*

As a result of this proceeding, Transit will be required to fund an account from which the restitution herein quantified will ultimately be made.

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[246] Including Trinidad Garage. It may be concluded by reviewing authorities that the date of transfer of Trinidad Garage is May 1970 and not September 1966, as I have found, or July 1967, when it was transferred below the line. In that case, the gain on the Trinidad land ($167,052) cannot be recognized in *DCC-I*, but would be recognized in *DCC-II* and credited to the farepayers.

[247] This figure results from the $1,592,048 net gain on depreciable property less the $1,058,856 drawn down in *Bobchick-II*.

[248] Order No. 1052 (WMATC, unreported) June 26, 1970, at 13, 24.

[249] July 11. 1970, through January 12, 1973.

Meanwhile, Transit's ability to fund this account remains unknown, and the company is under no restraint as regards the sale of its assets and the disposition of the proceeds. The Black United Front has previously filed a motion seeking to insure the farepayers realization of the restitution ordered by the Court. I believe the Commission is without power to provide that insurance, but our report to the Court should recommend that the Court take appropriate steps to sequester or encumber assets of Transit in an amount sufficient to fund the restitution award.

W. R. STRATTON, Chairman
Hearing Officer

A123

Hearing Officer Decision

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Appendix A

COMPENDIUM OF MARKET VALUE ESTIMATES AS OF AUGUST 15, 1956*

Property	(1) Market Value By Assessed Value Ratio Approach (Per Mr. Hatfield)	(2) Assessed Value (Per Mr. Harps)	(3) Market Value By Assessed Value Ratio Approach (Per Hearing Officer)	(4) Market Value By Appraisal (Per Mr. Harps)
Central Garage				
Land	$135,248	$ 87,911	$135,248	$ 293,000
Bldg	720,000	468,000	720,000	554,000
Total	855,248	555,911	855,248	847,000
Fourth Street Shop				
Land	277,551	180,408	277,551	421,000
Bldg	360,923	234,600	360,923	656,000
Total	638,474	415,008	638,474	1,077,000
Southern Carhouse				
Land	202,432	131,179	201,814	308,000
Bldg	160,155	103,800	159,692	180,000
Total	362,587	234,979	361,506	488,000
Maryland Line Right-of-Way	15,258	9,918	15,258	16,000
Benning Line Right-of-Way	4,991	3,244	4,991	3,700
Northeast Carhouse				
Land	188,585	122,580	188,585	229,000
Bldg	133,138	86,540	133,138	214,000
Total	321,723	209,120	321,723	443,000
Cabin John Right-of-Way	149,486	97,166	149,486	174,500
Georgia and Eastern Terminal				
Land	61,254	39,815	61,254	146,000
Bldg	8,923	5,800	8,923	12,500
Total	70,177	45,615	70,177	158,500
14th and V Streets Substation				
Land	11,963	7,776	11,963	6,200
Bldg	27,846	18,100	27,846	18,500
Total	39,809	25,876	39,809	24,700
13th and D Streets Storage Yard	2,792	1,815	2,792	4,755
Navy Yard Carhouse				
Land	164,437	106,884	164,437	320,500
Bldg	293,538	190,800	293,538	266,500
Total	457,975	297,684	457,975	587,000

Appendix A

COMPENDIUM OF MARKET VALUE ESTIMATES AS OF AUGUST 15, 1956*—(Continued)

Property	(1) Market Value By Assessed Value Ratio Approach (Per Mr. Hatfield)	(2) Assessed Value (Per Mr. Harps)	(3) Market Value By Assessed Value Ratio Approach (Per Hearing Officer)	(4) Market Value By Appraisal (Per Mr. Harps)
M Street Shop				
Land	$ 174,031	$ 113,120	$ 174,031	$ 301,500
Bldg	251,200	163,280	251,200	334,500
Total	425,231	276,400	425,231	636,000
Grace Street Shop				
Land	40,674	26,438	40,674	66,000
Bldg	84,615	55,000	84,615	84,000
Total	125,289	81,438	125,289	150,000
General Office Building				
Land	92,769	60,300	92,769	169,000
Bldg	923,077	600,000	923,077	728,000
Total	1,015,846	660,300	1,015,846	897,000
Parking Lot	10,385	6,750	10,385	9,200
Brookland Garage				
Land	148,563	96,566	148,563	320,500
Bldg	447,692	291,000	447,692	476,500
Total	596,255	387,566	596,255	797,000
Eastern Garage				
Land	193,196	123,930	190,662	496,000
Bldg	389,773	250,000	384,615	422,000
Total	582,969	373,930	575,277	918,000
Trinidad Garage				
Land	224,937	145,412	223,711	230,000
Bldg	256,315	165,700	254,923	280,000
Total	481,252	311,112	478,634	510,000
Total Land	2,098,552	1,361,212	2,094,174	3,514,855
Total Buildings	4,057,195	2,632,620	4,050,182	4,226,500
GRAND TOTAL	$6,155,747	$3,993,832	$6,144,356	$7,741,355

* As noted in the text, if findings of market value as of August 15, 1956, are deemed material, I find market value of the properties to be Mr. Harps' value estimates (Col. 4 above). If, in addition, it is determined that market values as of August 15, 1956, must be determined by the assessed-value-ratio method, I find that market value should be computed from Mr. Harps' reports of assessed value (Col. 3). Mr. Harps' reports of assessed value differ from Mr. Hatfield's (Col. 1) as to Southern Garage, Eastern Garage and Trinidad Garage.

Appendix B-1

AUGUST 15, 1956, INVESTMENT "COMPROMISE" RATE BASE THEORY, PER HEARING OFFICER

Property	(1) Net Book Value 08-15-56 (Table I, Col. 4)	(2) Adjustment* (Transit Ex. 41)	(3) 08-15-56 Investment Col. 1–Col. 2
Central Garage			
Land	$ 19,315	–	$ 19,315
Bldg	234,897	$47,534	187,363
Total	254,212	47,534	206,678
Fourth Street Shop			
Land	48,912	–	48,912
Bldg	400,120	84,385	315,735
Total	449,032	84,385	364,647
Southern Carhouse			
Land	40,177	–	40,177
Bldg	122,414	27,041	95,373
Total	162,591	27,041	135,550
Maryland Line Right-of-Way	4,301	–	4,301
Benning Line Right-of-Way	974	–	974
Northeast Carhouse			
Land	36,151	–	36,151
Bldg	75,157	13,827	61,330
Total	111,308	13,827	97,481
Cabin John Right-of-Way	96,237	–	96,237
Georgia and Eastern Terminal			
Land	31,199	–	31,199
Bldg	14,265	2,266	11,999
Total	45,464	2,266	43,198
14th and V Streets Substation			
Land	9,038	–	9,038
Bldg	3,192	1,870	1,322
Total	12,230	1,870	10,360
13th and D Streets Storage Yard	976	–	976
Navy Yard Carhouse			
Land	106,562	–	106,562
Bldg	47,688	27,310	20,378
Total	154,250	27,310	126,940
M Street Shop			
Land	65,793	–	65,793
Bldg	58,384	31,228	27,156
Total	124,177	31,228	92,949

Appendix B-1

AUGUST 15, 1956, INVESTMENT "COMPROMISE" RATE BASE THEORY, PER HEARING OFFICER (Continued)

Property	(1) Net Book Value 08-15-56 (Table I, Col. 4)	(2) Adjustment* (Transit Ex. 41)	(3) 08-15-56 Investment Col. 1–Col. 2
Grace Street Shop			
Land	11,294	–	$ 11,294
Bldg	48,107	$ 16,969	31,138
Total	59,401	16,969	42,432
General Office Building			
Land	44,127	–	44,127
Bldg	334,608	92,238	241,370
Total	378,735	93,238	285,497
Parking Lot	579	–	579
Brookland Garage			
Land	103,659	–	103,659
Bldg	103,860	43,671	60,189
Total	207,519	43,671	163,848
Eastern Garage			
Land	74,867	–	74,867
Bldg	87,799	37,157	50,642
Total	162,666	37,157	125,509
Trinidad Garage			
Land	40,733	–	40,733
Bldg	–	26,064	(26,064)
Total	40,733	26,064	14,669
Total Land	734,894	–	734,894
Total Buildings	1,530,491	452,560	1,077,931
GRAND TOTALS	$2,265,385	$452,560	$1,812,825

* The adjustment rests on the following assumptions and computations:

First, it was assumed that the difference between Transit's purchase price and the net book value of the company's assets was related only to depreciable property.

Second, it was assumed that the relationship was to the original cost of the depreciable property and not its net book value on the date of acquisition, which led to the ratio 22.224 percent: $10,339,041 (difference between price and net book value) divided by $46,522,633 (original cost of all depreciable property) equals .22224.

Third, this ratio, 22.224 percent of original cost of depreciable property, was used as the factor by which to reduce the net book value of depreciable properties as of August 15, 1956.

Fourth, one-half the reduction was then added back to give effect to the "compromise" rate base, which was midway between purchase price and net book value.

As a shortcut in Transit's presentation and in this table, rather than going through the steps "third" and "fourth" above (*i.e.*, reducing August 15, 1956, net book value by 22.224 percent of original cost and then adding back half of it) the August 15, 1956, net book value of each depreciable property is reduced by half of 22.224 percent of its original cost. The end result is the same.

COMMENT: As the text points out, I do not agree that the "compromise" rate base approach has an applicability to these proceedings. If it does, I do not agree with either assumption set out as "first" and "second" in the footnote above. My alternative findings under the "compromise" rate base approach appear in Appendix B-2.

FURTHER COMMENT: From this table, unrecovered investment on date of transfer may be computed by deducting depreciation and netting improvements and retirements between August 15, 1956, and date of transfer from the values in Column 3.

FINAL COMMENT: Very little is at stake in this exercise. Under Transit's "compromise" rate base theory total unrecovered investment at date of transfer is $2,323,403 whereas I have found the total unrecovered investment at date of transfer to be $2,317,056.

Appendix B-2

AUGUST 15, 1956, INVESTMENT "COMPROMISE" RATE BASE THEORY, PER HEARING OFFICER

Property	(1) Net Book Value 08-15-56 (Table I, Col. 4)	(2) Adjustment*	(3) 08-15-56 Investment Col.1–Col. 2
Central Garage			
Land	$ 19,315	$ 8,354	$ 10,961
Bldg	234,897	101,593	133,304
Total	254,212	109,947	144,265
Fourth Street Shop			
Land	48,912	21,154	27,758
Bldg	400,120	173,052	227,068
Total	449,032	194,206	254,826
Southern Carhouse			
Land	40,177	17,377	22,800
Bldg	122,414	52,944	69,470
Total	162,591	70,321	92,270
Maryland Line Right-of-Way	4,301	1,860	2,441
Benning Line Right-of-Way	974	421	553
Northeast Carhouse			
Land	36,151	15,635	20,516
Bldg	75,157	32,506	42,651
Total	111,308	48,141	63,167
Cabin John Right-of-Way	96,237	41,623	54,614
Georgia and Eastern Terminal			
Land	31,199	13,493	17,706
Bldg	14,265	6,170	8,095
Total	45,464	19,663	25,801
14th and V Streets Substation			
Land	9,038	3,909	5,129
Bldg	3,192	1,380	1,812
Total	12,230	5,289	6,941
13th and D Streets Storage Yard.	976	422	554
Navy Yard Carhouse			
Land	106,562	46,088	60,474
Bldg	47,688	20,625	27,063
Total	154,250	66,713	87,537

Appendix B-2

AUGUST 15, 1956, INVESTMENT "COMPROMISE" RATE BASE THEORY, PER HEARING OFFICER (Continued)

Property	(1) Net Book Value 08-15-56 (Table I, Col. 4)	(2) Adjustment*	(3) 08-15-56 Investment Col.1–Col. 2
M Street Shop			
Land	$ 65,793	$ 28,456	$ 37,337
Bldg	58,384	25,251	33,133
Total	124,177	53,707	70,470
Grace Street Shop			
Land	11,294	4,885	6,409
Bldg	48,107	20,806	27,301
Total	59,401	25,691	33,710
General Office Building			
Land	44,127	19,085	25,042
Bldg	334,608	144,718	189,890
Total	378,735	163,803	214,932
Parking Lot	579	250	329
Brookland Garage			
Land	103,659	44,833	58,826
Bldg	103,860	44,919	58,941
Total	207,519	89,752	117,767
Eastern Garage			
Land	74,867	32,380	42,487
Bldg	87,799	37,973	49,826
Total	162,666	70,353	92,313
Trinidad Garage			
Land	40,733	17,617	23,116
Bldg	–	–	–
Total	40,733	17,617	23,116
Total Land	734,894	317,842	417,052
Total Buildings	1,530,491	661,937	868,554
GRAND TOTALS	$2,265,385	$979,779	$1,285,606

* The adjustment is measured by the ratio of the purchase price ($13,500,000) to the net book value of the company on the date of acquisition ($23,800,000) and is applied equally to all property, depreciable and non-depreciable. In other words, I have assumed that Transit bought every asset of its predecessor at 56¾ percent of its net book value. See discussion on page 18.

Appendix C

SUPPLEMENTARY FINDINGS MARKET VALUE AT DATE OF TRANSFER, BASED ON ASSESSED VALUE RATIO OF 65 PERCENT

Property	Date of Transfer	(1) Assessed Value Date of Transfer	(2) Market Value Date of Transfer [(1) ÷ .65]
Central Garage	09-30-58		
Land		$ 87,911	$135,248
Bldg		468,000	720,000
Total		555,911	855,248
Fourth Street Shop	01-16-59		
Land		180,408	277,551
Bldg		234,600	360,923
Total		415,008	638,474
Southern Carhouse	01-16-59		
Land		131,179	201,814
Bldg		103,800	159,692
Total		234,979	361,506
Maryland Line: Right-of-Way	04-30-59	9,918	15,258
Benning Line: Right-of-Way	04-30-59	3,244	4,991
Northeast Carhouse	05-31-59		
Land		122,580	188,585
Bldg		86,540	133,138
Total		209,120	321,723
Cabin John Right-of-Way	01-31-60	103,308	158,935
Georgia and Eastern Terminal	10-31-60		
Land		39,815	61,254
Bldg		5,800	8,923
Total		45,615	70,177
14th and V Streets Substation	01-31-62		
Land		7,776	11,963
Bldg		18,100	27,846
Total		25,876	39,809
13th and D Streets Storage Yard.	01-31-62	1,815	2,792
Navy Yard Carhouse	06-30-63		
Land		106,884	164,437
Bldg		190,800	293,538
Total		297,684	457,975

Appendix C

SUPPLEMENTARY FINDINGS MARKET VALUE AT DATE OF TRANSFER, BASED ON ASSESSED VALUE RATIO OF 65 PERCENT (Continued)

Property	Date of Transfer	(1) Assessed Value Date of Transfer	(2) Market Value Date of Transfer [(1) ÷ .65]
M Street Shop	06-30-63		
Land		301,652	464,080
Bldg		157,100	241,692
Total		458,752	705,772
Grace Street Shop	09-30-63		
Land		92,533	142,358
Bldg		60,000	92,308
Total		152,533	234,666
General Office Building	01-01-64		
Land		180,900	278,308
Bldg		700,000	1,076,923
Total		880,900	1,355,231
Parking Lot	01-01-64	18,000	27,692
Brookland Garage	09-11-66		
Land		206,621	317,878
Bldg		259,000	398,462
Total		465,621	716,340
Eastern Garage	09-11-66		
Land		267,803	412,005
Bldg		255,000	392,308
Total		522,803	804,313
Trinidad Garage	09-11-66		
Land		160,247	246,534
Bldg		165,400	254,462
Total		325,647	500,996
Total Land		2,022,594	3,111,683
Total Bldgs.		2,704,140	4,160,215
GRAND TOTALS		$4,726,734	$7,271,898

APPENDIX D
DATE-OF-TRANSFER BASIS

Data for this appendix may be found in Table IV, Column 3, at page 76 of this report.

Commission Decision

BEFORE THE WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION WASHINGTON, D. C.

IN THE MATTER OF:	Dated: June 30, 1978
REMANDS from the United States Court of Appeals for the District of Columbia Circuit of D. C. Transit System, Inc., proceedings:	Circuit Court Numbers: 21865, 23720, 23747, 24398, 24415 and 24428:
Application of D. C. Transit System, Inc., for Authority to Increase Fares	Appliation No. 226 Docket No. 32
	and
Application of D. C. Transit System, Inc. for Authority to Increase Fares	Application No. 344 Docket No. 101
Application of D. C. Transit System, Inc. for Authority to Increase Fares	Application No. 453 Docket No. 156
	and
Application of D. C. Transit System, Inc. for Authority to Increase Its Fleet in Lieu of Purchasing Buses	Application No. 436 Docket No. 156
Application of D. C. Transit System, Inc., for Authority to Increase Fares	Application No. 613 Docket No. 216

APPEARANCES:

Donald J. Balsley, Jr., for staff Washington Metropolitan Area Transit Commission

Leonard N. Bebchick, for Leonard N. Bebchick, *et al.*

Landon Gerald Dowdey, for Democratic Central Committee of the District of Columbia, *et al.*

Commission Decision

Gilbert Hahn, Jr., and Maynard H. Dixon, Jr., Debra Lynne Gruenstein, and Christopher C. Roberts, for Black United Front

Harvey M. Spear, Stanley J. Fineman and Michael J. McGovern, for D. C. Transit System, Inc.

DECISION

BEFORE:

William R. Stratton, Chairman, Judge Preston C. Shannon, and Michael D. Barnes, Commissioners

By exceptions to the Report of the Hearing Officer (Report), served February 17, 1978, a joint record is before us with respect to the property issues in *DCC-I,*[1] *DCC-II,*[2] and *Bebchick-II.*[3] Exceptions to the Report were filed by all parties: Leonard N. Bebchick, *et al.* (Bebchick), Black United Front (BUF), Democratic Central Committee of the District of Columbia (Committee), Washington Metropolitan Area Transit Commission staff (staff), and D. C. Transit System, Inc. (Transit). BUF has filed a reply to the exceptions noted separately by Bebchick, staff and Transit. Staff has filed an answer to the exceptions of Transit. Transit has filed a reply to the exceptions and briefs of the other parties.

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[1] *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Commission,* (No. 21865) 158 U.S. App. D.C. 7, 485 F.2d 786 (D.C. 1973), *cert. denied* 415 U.S. 935, 94 S.Ct. 1451, 93 L.Ed.2d 493.

[2] *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Commission,* (Nos. 24398, 24415 and 24428) 158 U.S. App. D.C. 107, 485 F.2d 886 (D.C. 1973), *cert. denied* 415 U.S. 935, 94 S.Ct. 1451, 93 L.Ed.2d 493.

[3] *Leonard N. Bebchick* v. *Washington Metropolitan Area Transit Commission,* (Nos. 23720 and 23747) 158 U.S. App. D.C. 79, 485 F.2d 858 (D.C. 1973).

Commission Decision

Several matters that occurred between service of the Report in February and oral argument on April 10, 1978, require resolution. In particular, two stipulations[4] by the staff and Transit have been submitted for our review. The first stipulation is to a valuation of the Cabin John Line Right-of-Way different from that found by the Hearing Officer. This stipulation is accepted and our findings herein modify the Report accordingly.[5] The second stipulation contains two parts: the first fills the evidentiary void on the cost of removing tracks at the Georgia and Eastern Avenues Terminal and in the Maryland Line Right-of-Way. This stipulation is accepted as to both properties and our findings herein modify the Report to reflect the cost of removing tracks. The rest of the stipulation responds to a solicitation in the Report of date-of-transfer market values for the Eastern Garage, Brookland Garage and Trinidad Garage as of August 15, 1976. Since we have determined that the Report should be modified to exclude Brookland Garage and Eastern Garage and to change the date of transfer for Trinidad Garage, we do not rule on the stipulation in connection with our primary findings.[6]

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[4] The stipulations contain nearly identical clauses saving to the parties to the stipulation and others in this proceeding the right to pursue any issues previously raised. The stipulations thus relate solely to the evidentiary record and do not constitute a compromise with respect to ultimate facts and legal theories.

[5] Our factual findings are embodied in our tables appended to this report.

[6] The stipulation will accompany the record. It represents the agreement between staff and Transit as to the values of Brookland, Eastern and Trinidad garages as of September 11, 1966, assuming Order No. 634 would expire on August 15, 1976, the terminal date of Transit's franchise. The stipulation, including the calculations of taxes and sales expenses resulting from a modification in date-of-transfer market value, is adopted as our alternative finding of date-of-transfer market value in the event the Court determines these properties should be included under the staff's *de facto* theory.

Commission Decision

Transit, through its counsel, submitted a revision to taxable income for the years 1967 through 1972 subsequent to the Report and prior to the oral argument. At the oral argument Bebchick distributed an outline of its method of calculating taxes. Also at the oral argument, staff submitted revisions of Staff Exhibit Nos. 35 and 36 to reflect the values set forth in the two stipulations with Transit. We have reviewed these items for their informational content. However, we will not make them exhibits in this proceeding because the Hearing Officer properly closed the record at the end of the hearing. These documents and the correspondence concerning them have been placed in the Commission files where they can be drawn upon by the parties as they may desire.

The BUF filed a motion to strike portions of Transit's reply to the exceptions of other parties as raising new matters. The motion is, in effect, a reply to a reply and pursuant to our Rules of Practice not acceptable.[7] In any case the issues between these parties were joined in their exceptions and replies. Accordingly, the motion is dismissed.

The Report is the basic reference for our review of the record and the parties' exceptions and replies. For the purpose of clarity, we shall use the framework developed by the Hearing Officer. We are unanimous in our decision, and to the extent not modified herein we

[7] In order to determine the motion to strike to be a reply to a reply, we have had to read and consider the arguments presented by BUF. The matters presented by the motion have not impinged upon our consideration of the arguments presented in the reply by Transit.

adopt the findings, conclusions and recommendations contained in the Report.[8]

THE PROPERTIES

Transit excepts to including Brookland Garage, Eastern Garage, 4th Street Shop, Southern Carhouse, and Georgia and Eastern Avenues Terminal among the properties covered in this proceeding. We agree with respect to Brookland Garage and Eastern Garage.

Transit presents four separate arguments for exclusion of Brookland and Eastern garages. First, the date of transfer should be determined by the date of the accounting entry recording the removal of the property from the operating asset account either by sale or transfer "below-the-line". Second, the Commission by Order No. 634 required Transit to retain these properties in "operating" status, and it is impermissible now to determine that the properties were in "non-operating" status. Third, subsequent to Order No. 634 the Commission continued to certify these properties for real estate tax exemption and included them in rate base. Fourth, the appendix to *DCC-I* is merely a list of possible properties to be included and the Commission is to enter independent findings upon a full record.

The Report sets forth the basis for the inclusion or exclusion of properties:

> In *DCC-1* the Court has directed that the farepayers shall receive restitution measured by the net gain on all properties transferred out of operating status prior to the effective date of Order No. 773, January 26, 1968.*52* In *DCC-II* res-

[8] The Procedural History and Substantive History set forth in the Report (pages 1-8) have not been excepted to. We, therefore, have used that history as it was necessary or useful in developing the *ratio decidendi* applicable to each exception before us.

> titution is available from the net gain on the land portion (not the buildings) of all properties transferred out of operating status prior to the effective date of Order No. 1052, June 26, 1970, subject to its exhaustion in satisfying the restitution requirement of *DCC-I.53* (Report at 10)[9]

The Report failed to apply this Court-directed standard of identification when it came to Brookland Garage and Eastern Garage.

Order No. 634 required Transit to hold Brookland Garage, Eastern Garage and Trinidad Garage in operating status. Only with the agreement of the Commission could Transit thereafter transfer the properties from operating status. This necessity for Commission consent is exemplified by the transfer of Trinidad Garage, which took place only upon Transit's request and the entry of Commission Order No. 718.[10] Transit never applied for transfer and the Commission never directed the removal of Brookland Garage and Eastern Garage from operating status, where they remained until Transit's demise as a franchised carrier. That these properties were not included among the assets condemned by the Washington Metropolitan Area Transit Authority is probative evidence of their inutility as operating properties in 1973, and perhaps some time prior to that, but this is hardly evidence that these properties had no use in utility service on the very day of a Commission order that they be retained in operating status. At least as to the period September 1966 through June 1970 (the latest relevant date for purposes of these proceedings), we believe it

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[9] For example, the property at 11th and Monroe Streets was excluded from consideration because it was transferred after June 28, 1970.

[10] (WMATC, unreported) July 3, 1967.

appropraite to accept the continuing determination of our predecessors that these properties remained in utility service, where presumably they benefitted farepayers.

UNRECOVERED INVESTMENT

Transit excepts to the use of net book value as of the date of transfer as the subtrahend in the appreciation formula. Transit submits that the subtrahend should be either the market value on August 15, 1956 (the date of acquisition of the properties), or the "system" rate base values as of the date of transfer. In addition, Transit believes the $3,290,000 it agreed to pay the District of Columbia in settlement of its track removal obligation, and the $168,044 unamortized balance in the Acquisition Adjustment Account should be included in its unrecovered investment.

Transit's "market-to-market" argument views the amount of gross gain found in the Report as consisting of two components: the difference between market value and the (lower) net book value on the date of acquisition is one; the difference between date-of-acquisition market value and the (higher) date-of-transfer market value is the other. Following the rationale of the Report, both components would be awarded to the farepayers. The award of the first component to the farepayers, Transit argues, deprives its investors of the benefit of their bargain purchase, thereby stripping them of the very advantage which was the principal footing for the Court's determination that the farepayers are entitled to the appreciation in value of these properties while in utility service. Transit submits that this act constitutes an uncompensated "taking," or, at the least, is inequitable.

Transit cites the many instances in the Court's opinion in which the farepayers' entitlement is equated with the increase in value of the properties, and insists that value (whether at date of transfer or date of acquisition)

must be measured with reference to the market. In contrast the Report read the Court's opinions as requiring the equation of date-of-acquisition value with net book value on that date, and date of transfer value with market value on that date. To state the proposition another way, the Report equated Transit's investment in each property to net book value on the date of acquisition, and awarded the farepayers the entire difference between that value and market value on the date of transfer regardless of whether that increase in value materialized at the instant of purchase of the property at less than its market value or took place over its subsequent service life.

We believe the result reached in the Report is compelled by the language of the Court's opinion, and we hereby ratify it. But lest we be remiss in expressing our view of the matter, we do here state our agreement with the conclusion that the recommended decision in the Report does, in fact, deny Transit's investors the benefit of their bargain purchase. The properties acquired on August 15, 1956, were continued on the books at their original cost less depreciation. These booked costs represented "values" which did not begin to approach market values.[11] The properties, as of the date of acquisition by Transit, had a market value greatly in excess of that reflected by the books.[12] This pre-Transit, embedded growth in value over original cost has been awarded in its entirety to the farepayers who enjoyed

[11] It must also be admitted that Transit's purchase price was substantially less than book value; whether this generally-true statement may be extended to each individual property would depend on an allocation of the purchase price to assets, which has never been made.

[12] A comparison of Mr. Harps' appraisals of these properties as operating properties ($7,741,355) compared with net book value ($2,265,385) reflects one measure of this difference ($4,475,970). Another measure might be to compare book value with market value in non-transit use.

(or suffered) fares set with reference to these low historical costs for seventeen years.[13] Quite frankly, if the Court's opinion would bear the interpretation, we would measure the farepayers' restitution by subtracting the market value on August 15, 1956, from the market value of each property on the date of transfer,[14] subject to an aliquot offset for sales expense and taxes.

In the alternative, Transit argues for the use of net book values calculated on the "system rate base" as the subtrahend in the value appreciation formula. Transit thereby argues that its investors are entitled not only to a reasonable rate of return on the system rate base, but by implication, the recovery of the system rate base itself.

The Report's rejection of the "system" or compromise rate base is properly founded and we adopt it as our own conclusion:

> The question posed is whether the unrecovered investment as measured by "net book costs"[83] must or may be calculated using the "compromise" [system] rate base, as it would have been on August 15, 1956, as the starting point.[84] I conclude that we are neither required, nor even authorized, by anything in the Court's opinions to do so. An "investment" that bears no relationship to actual cost will not do. The "compromise" rate base is not representative of cost any more than market value. (Report at 17)

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[13] Indeed, the effect of the Acquisition Adjustment was to value the properties at even less than booked cost, an effect that was only half-cured by the "system rate base" approach to ratemaking.

[14] This would reduce gross gain rather drastically, to $2,093,700, as a comparison of Mr. Harps' appraisals of these properties as of the dates of transfer ($9,835,055) with his appraisals of these properties as operating properties on the date of acquisition ($7,741,355) demonstrates.

Neither the Court's opinions nor logic nor history require the use of the artificially-constructed "system rate base" in this proceeding.

The unrecovered investment found in the Report will not be increased by Transit's $3,290,000 track removal payments to the District of Columbia. First, this obligation was incurred after the date of Order No. 1052,[15] the terminal date for our fact-finding task. Second, track removal expense is not related to the property issue. Third, the farepayers were not represented in the compromise that produced the dollar amount of Transit's obligation. For any of these reasons, we reject Transit's exception to the Report's determination not to increase unrecovered investment by $3,290,000.

Transit also asks that the $168,044 balance in the Acquisition Adjustment Account be deducted from the depreciation reserve attributable to the properties. A reduction in the depreciation reserve would increase Transit's unrecovered cost and reduce the award to the farepayers.

It will be remembered that the Acquisition Adjustment Account was amortized as an offset to depreciation expense. By reducing depreciation expense it benefitted the farepayers and brought about the equalization of book value of Transit's utility assets with Transit's purchase price. The Acquisition Adjustment offset against depreciation expense was accounted for separately from the accruals to the depreciation reserve and did not operate to reduce this reserve which at all times was directly related to original cost. To reduce the depreciation reserve now would not only do violence to an account-

[15] The obligation in fact was incurred on the eve of and in anticipation of the acquisition by Washington Metropolitan Area Transit Authority of Transit's regular-route bus operations assets.

ing treatment that made good sense for 17 years but would award to Transit $168,044 which should, if anything, flow to the farepayers.

As the Report points out, a Commission that could have anticipated the rulings in *Bebchick-II* and the *Democratic Central* cases would in fairness have made charges against the Acquisition Adjustment Account from time to time as properties were transferred below the line in order to maintain parity between the asset base being depreciated and the related Acquisition Adjustment Account being amortized. It will be conceded that the failure to do this over the years works a hardship on Transit in this proceeding. Likewise, it must be conceded by Transit that the failure fully to amortize the Acquisition Adjustment Account in the context of this proceeding where the farepayers have been awarded what is in effect the difference between Transit's purchase price and a market value at a later date, works a hardship on the farepayers.

Thanks to Transit's failure to offer evidence permitting a reliable estimate of the hardship it suffered, it is impossible to do more than rough justice in balancing that hardship with the hardship borne by the farepayers. An examination of the record in this proceeding would lead one to conclude that the penalty visited upon Transit through the imbalance of the depreciation and acquisition account accruals was less than $168,044. We therefore affirm the Report on this issue as against Transit's exception.

MARKET VALUES AT DATE OF TRANSFER

Transit excepts to the Report's rejection of tax-assessments as a basis to calculate value. Transit reiterates its position that the prior use of tax-assessment-ratio methods by the parties binds the Commission to the use of that method of valuation in this proceeding. Transit

believes the tax-assessment-value ratio method should be used because the "after-the-event appraisals" by Mr. Harps do not represent contemporaneous valuations.

Although this proceeding is a continuation of the prior rate proceedings, the parties and the Commission were not constrained to follow a disfavored method of valuation. We adopt as our own the following finding in the Report.

> I find his testimony [Mr. Harps' appraisals] and supporting exhibits to be more credible evidence of date-of-transfer market values than extrapolated assessed values. (Report at 24 and 25)

Only a few of Transit's properties were sold directly from operating status in an arms-length transaction. The Court's opinion directs us to deem transfers to be sales and determine a market value as of the date of transfer. Given the time it came, this direction inherently requires the use of after-the-event appraisals to establish a value in a market contemporaneous with the transfers. This requires selection among methods of valuation. We believe the methods adopted in the Report are the most valid on a property-by-property basis.

BUF, staff and Transit have filed exceptions to the Report with respect to the 4th Street Shop and Southern Carhouse. BUF would have us modify the Report by calculating gain using the actual sale price as the market value. The staff would have us base market value on the sale price of the land as found by the District of Columbia Public Utilities Commission (PUC) in 1959. Transit argues these properties are not properly before us because the Court and the PUC have ruled finally on the disposition of the proceeds from their sale. The prior decisions, Transit argues, legally and equitably foreclose any award of gain on these properties to the farepayers in *DCC-I* and *DCC-II.* In addition Transit claims an in-

equity in awarding these gains to the farepayers since the entire proceeds of the sale of the 4th Street Shop and Southern Carhouse were applied to development of the Bladensburg Maintenance Base. This argument may have some appeal if it is addressed to the situation in 1959. Meanwhile, of course, the Bladensburg Maintenance Base has been taken in condemnation. We look in vain for equity in a result that denies the farepayers the right to trace "their" gain on the 4th Street Shop and Southern Carhouse through to Transit's assets now. Finally, Transit claims the Report's treatment of the 4th Street Shop and Southern Carhouse results in a double credit to the farepayers of the $613,661 previously allocated to the farepayers by PUC Order No. 4577.[16]

The Report sets forth the ultimate *ratio decidendi* for rejection of Transit's claims based upon the theory of *res judicata:*

> Moreover, the earlier decisions dealing with the proceeds of the sale of these properties all related to the availability of gains to offset charges arising out of the streetcar-to-bus conversion program.[124] This proceeding deals with the availability of these gains to defray costs upon which fare increases were predicated.[125] It is by no means established that the question of use of the gains on the depreciable portion of these properties to offset a fare increase has been foreclosed by prior decisions, which is a necessary underpinning to a *res judicata* plea. (Report at 33)

Transit's arguments, although artfully drawn, do not overcome the reasoning set forth in the Report. The issue, use of appreciation in property values to mitigate an increase in fares, with which we are concerned upon

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[16] *D.C. Transit System, Inc.* (Order No. 4577) 30 P.U.R.3d 405 (D.C. P.U.C., 1959).

these remands, was never presented to a Commission or the Court before the *Democratic Central* cases. The PUC proceeding in 1959 was not a rate case in which that issue could be properly presented. We therefore reject Transit's argument; it fails to establish the underpinning essential to a finding of *res judicata.*

The Report rejects the use of the actual sales price for 4th Street Shop and Southern Carhouse as the best evidence of market value because the properties were sold under the threat of condemnation.

> On the other hand, prices associated with sales under condemnation or threat of condemnation are uniformly rejected as evidence of fair market value.[128] The sale of these properties to the urban renewal arm of the District Government was indisputably such a sale. (Report at 34)

We adopt Mr. Harps' appraisal value. The sale of these properties to RLA for a sum substantially in excess of either of Mr. Harps' two appraisals of record is an anomaly which cannot be explained; the staff exercised the utmost diligence in attempting to probe the circumstances surrounding these sales. The sale of the 4th Street Shop and Southern Carhouse was not an arms-length sale.

It was not error to deny a credit to Transit for the $613,661 awarded the farepayers in 1959 by PUC. That award was related to the actual sale price, and its allocation between land and buildings by PUC. The Report relied on an appraisal to determine value and found all the value (which was much lower than the actual sale price) to be in the land.

We find the staff's approach to be the second best solution to the complexities presented by the 4th Street/Southern sale. Entitlement to the portion of the proceeds allocated to land by PUC has never been in

contest before a regulatory body or the Court and, thus, a collateral estoppel does not arise unless we determine that the Transit Commission staff is a privy of the Public Utilities Commission staff. We find to the contrary. Accordingly, we adopt the calculation proposed by the staff as our alternative finding of gross gain on these properties. Transit is not entitled to a $613,661 offset if the staff's approach is followed. Staff in conceding res judicata as to the depreciable portions of these properties has left the division of the proceeds of sale relating to the buildings (including the $613,661) as the PUC made it. Under the staff's theory, where the gain included on the actual sale price of the land as found by PUC is awarded the farepayers, the farepayers are not being credited a second time with the $613,661 previously credited to them from the gain on the building.

In the event the Court resolves the question of valuation as the BUF suggests, we would still recommend use of the staff's allocation in formulating the relief to be granted the farepayers.

Bebchick and Transit both noted exceptions to the Report's valuation of the Central Garage. Bebchick challenges the value of the depreciable portion as too low and Transit contends the total value is too high. Bebchick urges the use of the more contemporaneous appraisal of Mr. Thornton Owen[17] rather than the after-the-fact appraisal by Mr. Harps. Transit contends that the proper interest rate to be used in the capitalization of income should be 6 percent, as used by Mr. Owen.

Neither position is persuasive. The fundamental flaw is the claim to contemporaneity of the Owen appraisal. In fact, Mr. Owen did not value the property as of the date of transfer. Without more information on the

[17] Mr. Owen had died before his appraisal was offered in this record.

purpose[18] of the Owen appraisal, we cannot accept his opinion as to value or interest rates. Mr. Harps stood cross-examination by Transit and Bebchick and we accept his valuation.

Transit also challenges the Report's valuation of the Northeast Carhouse on the basis of another Owen appraisal. Transit seeks to have us adopt an income analysis based upon the actual rent and conversion cost occurring after the date of transfer and the capitalization rate and recapture period in Mr. Owen's more contemporaneous appraisal.[19]

We agree with the Hearing Officer in rejecting an appraisal based on after-the-fact events in favor of that of Mr. Harps who demonstrated professional flexibility on the witness stand.

Transit also asks that the valuation of the General Office Building be reduced to take account of certain conversion costs that occurred after the date of transfer. The conversion costs in question occurred, according to Transit, between January 1, 1964 (the date of transfer as reflected on the books) and August 1964 (when the Commission retroactively directed the transfer). This is simply an effort to have unrecovered investment determined as of August 1964 and market value determined as of January 1, 1964, a mismatching which we reject.

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[18] The record does not reveal who retained Mr. Owen, the purpose for performing the appraisal, or any assumptions made by Mr. Owen as to the use of the appraisal.

[19] No appraisals were forthcoming which reflected valuations as of a date of transfer. In the face of diligent discovery efforts by Bebchick and the staff, Transit denied that any appraisals had been prepared when the properties were transferred out of operating status.

Commission Decision

BUF urges us to make supplemental findings as to the net gain on the Trinidad Garage assuming a date of transfer of May 8, 1970.[20]

The Report found the date of transfer of Trinidad Garage to be September 11, 1966. Consistent with the view expressed on the Brookland and Eastern garages, we likewise reject September 11, 1966, as the date of transfer of the Trinidad Garage. BUF, as noted, proposes that the date of transfer be found to be May 8, 1970, when this property was sold. Transit is indifferent as between that date and July 3, 1967, when the Commission authorized removal of Trinidad Garage from service, insisting only that September 11, 1966, is error.

We accept the alternative finding in the Report and find the date of transfer to be July 3, 1967.[21] We find the value of Trinidad Garage to be $525,000 as of that date.

> If, on the other hand, the Commission accepts Transit's view that the situation *de jure* rather than *de facto* is determinative of the date of transfer, it will reject September 11, 1966, as the date of transfer for the Trinidad Garage. In that event, I find July 3, 1967, when the property was authorized to be sold, is the date of transfer rather than May 8, 1970. This finding would be consistent with the Court's view that transfer out of service and not sale and realization of gain is the touchstone of farepayer entitlement to value appreciation. (Report at 62)

In the event the Court finds the date of transfer to be May 8, 1970, we find the gross gain to be $459,269.72, as BUF has suggested.

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[20] BUF would equate gross gain to $459,269.72, the amount recorded below the line as gross gain on Transit's books when this property was sold in May 1970.

[21] This determination brings Trinidad Garage under the purview of both *DCC-I* and *DCC-II*.

SALES EXPENSES AND INCOME TAXES

BUF excepts to the Report's allowance of brokerage commissions and taxes on the sale of the 4th Street Shop and Southern Carhouse, and to brokerage commission on the sale of Trinidad Garage. The staff has noted a similar exception with respect to the 4th Street Shop and Southern Carhouse.

While we reject these exceptions, we do believe that when it comes to the allowances for expenses and taxes a distinction exists between properties voluntarily sold, on the one hand, and, on the other, properties sold to condemning authorities or transferred. As to the former (only the Grace Street Shop, the 14th and V Substation and the Georgia and Eastern Terminal) expenses and taxes actually paid will be allowed.[22] As to sales expenses for all other properties we adopt the findings set forth in the Report. The proceeds of the properties sold to RLA have been invested in like-kind property which, when finally disposed of, will bear sales expenses, a fact that should be recognized in this proceeding.

Bebchick would have us modify the Report by excluding any allowance whatsoever for brokerage commissions. The evidence of record, it is argued, negates any allowance for brokerage commissions because Transit maintained an "in-house" real estate department and did not incur commissions on properties actually sold. In addition, Bebchick argues that brokerage commissions should not be allowed on the properties transferred for stock to a newly-created subsidiary of Transit.

The evidence of record proves no more than that Transit did not pay brokerage commissions on the voluntary sales that did occur. As to such sales, brokerage

[22] These amounts, which are reflected in the attached tables, were gleaned from the record or other WMATC data which we noticed officially.

commissions allowed in the Report are reversed in this decision. However, with respect to transfers out of operating status, the Court has required recognition of sales expenses, and we believe this requirement rationally applies to property involuntarily sold to RLA. Accordingly, Bebchick's request for a disallowance of brokerage commissions is rejected.

Transit excepts to the denial of "holding costs" as an element of sales expense. Transit defines "holding costs" as the expenses incurred between the date a property is listed for sale and the date it is sold. Transit submits that the assumption of a sale on the very day of transfer from operating status is artificial and contrary to business reality.

The Report succinctly sets forth the proper bases for rejecting Transit's claim:

> The question is whether such costs are allowable as a sales expense in this proceeding. I have determined that they are not for two reasons: first, as Mr. Harps put it, holding costs are an expense of ownership not an expense of sale, and would be incurred in any case;[191] second, this proceeding assumes a sale on the date of transfer below the line. Expenses before that date would have been charged to the farepayers,[192] and expenses after that date are not allowable. (Report at 67)

To this we would add the possibility that Transit could in fact maintain a property above the line until a sale was imminent. (See Order No. 718)[23] The Court has already decided the date upon which sales expenses must be determined; it is the date of transfer.

Bebchick, BUF, Committee and staff have all noted exceptions to the Report's conclusion on income tax expense. Bebchick believes the Commission should adopt

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[23] *Supra,* n.10.

a calculation of tax expense which represents the best estimate of the actual incremental tax Transit would have paid if the various properties had actually been sold on the dates of their respective transfers to non-operating status. Bebchick thus would have us accept the staff's testimony restructuring Transit's entire tax anatomy for taxable years long since closed, including recalculations of net operating loss carrybacks and carryforwards and investment tax credits. BUF argues for the same result, extending the argument to all properties before us rather than the six depreciable properties to which *Bebchick-II* is limited.

The staff, in common with BUF and Bebchick, urges us to reconstruct Transit's tax history melding the imputed results of date-of-transfer "sales" with the actual results of operations.[24] The staff did not interpret the Court's mandate to require a property-by-property approach to the calculation of sales expense or tax expense and its evidence was presented on an aggregated basis.

Committee, seizing upon footnote 193 of the Report, argues against the recognition of any tax expense. This argument rests on the assumption that Transit will not have to pay income taxes on gains, when realized, to the extent they have been flowed to the farepayers under the Court's mandate. The validity of the Committee's position depends on Internal Revenue Service

[24] This is sometimes called the "real world" approach, a phrase that we do not find descriptive of tax levels based upon imputed sales under conditions that cannot be duplicated. While it cannot be assured that these transactions, when they do occur, will bear taxation at the marginal rate, we find no basis to prefer any other tax rate in anticipating the tax burden.

recognition of the amounts paid by Transit in consequence of these cases as an increment to basis. This would reduce taxable gain when sales do occur.[25]

Pursuant to the distinction drawn between voluntary sales as opposed to transfers or sales to condemning authorities we shall modify the Report. The tax expense actually incurred on voluntary sales will be allowed. However, on all other sales or transfers we reject the positions developed by Bebchick, BUF, Committee and staff and adopt the use of a marginal rate. So far as it goes, we agree with the conclusion developed in the Report:

> I reach this conclusion because the standard regulatory treatment of prospective income taxes is to recognize them at the marginal rate. If the Commission had timely recognized value appreciation as an offset to the depreciation deficiency or to fare increases we would have done so in an order that spoke prospectively. In doing so we would have presumed profitable operations, otherwise we would have denied the validity of our fare orders to offer an opportunity for earnings. Therefore, we would have assumed hypothetical sales by a profitable company taxable at the marginal rate then in effect—25 percent.[203] [204] (Report at 74 and 75)

As to all the properties not yet sold and all sales where taxes have been deferred, Transit will someday experience a taxable event. At that time, so far as can be said today, taxes at the rate of 28.75 percent of the gain will be payable.

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[25] This question of tax law was first raised in footnote 193 to the Report. Its resolution is outside our expertise and does not depend on the facts we have found. We believe it is a question for the Court.

We thus grant Transit's exception to the Report's use of a 25 percent marginal tax rate. The District of Columbia capital gains tax should be included along with the federal as a tax expense because both taxes will be levied when the properties or proceeds not yet assessed come within the tax collector's purview. Accordingly, we find that for all properties except the Georgia and Eastern Terminal, the Grace Street Shop, and the 14th and V Streets Substation, the applicable tax expense is 28.75 percent of net gain.

BUF challenges the tax treatment accorded the General Office Building. BUF would have us deduct the equitable offset from market value before calculating taxable gain; this would reduce tax expense by about $70,000.

We cannot agree. The equitable offset derives from Transit's continued use of the General Office Building after the date of transfer. The amount thus reflects a balancing of the equities after the sale deemed to have occurred under the Court's mandate. The "rent" paid by the farepayers does not impact the sale price of the property and an adjustment in tax expense would be improper.

In the event the Court accepts the theory advanced by staff, BUF and Bebchick for the calculation of tax expense, we have entered alternative findings (see Table VI) which will enable the calculation of the restitution due the farepayers. These findings embody the "Bebchick modification" to enable an allocation of taxes to the properties involved in *Bebchick-II.*

ISSUES PECULIAR TO BEBCHICK-II

Transit notes an exception to the Report's finding that the sources for the depreciation reserve "make-up" include depreciable properties transferred after August 15, 1963. Transit believes the Court restricted our consider-

ation to depreciable properties transferred prior to August 15, 1963, which was the reference date for the depreciation deficiency study by Stone and Webster Service Corporation. The idea is to match the period over which appreciation took place to the period within which the depreciaiton deficiency arose. On this basis Transit urges us to limit our consideration to properties transferred prior to August 15, 1963.

Transit also advances a "statute of limitations" theory which would restrict the time period over which appreciation would be measured to the three years immediately prior to the date of the order establishing the amount of the depreciation deficiency (Order No. 564, January 26, 1966).

Transit's arguments were reviewed in depth in the Report and rejected:

> No support for this position is to be found in the Court's language in either *Williams*[217] or, more importantly, *Bebchick-II*. In making the comparison between book and market values to be used in ascertaining gain, the Court refers to the properties' market value "at the time of transfer"[218] not "at August 15, 1963," or "within three years of Order No. 564" as Transit would have it. Furthermore, although it is true, as the Court puts it, that the ". . . depreciation deficiency . . . should have been recovered prior to August, 1963"[219] the fact that it was not does not limit corrective action to that which could have been taken by that date. As a matter of fact, depreciation deficiencies are ordinarily corrected after the fact. (Report at 80 and 81)

We accept the reasoning set forth in the Report and decline to modify it with respect to "matching periods" as requested by Transit; we have previously rejected the statute of limitations bar in Order No. 1356.[26]

Transit asserts error in the Report's finding that the relief to be awarded in *Bebchick-II* includes the $806,168 treated in the *Williams* case.[27] Transit argues that the Court has failed to grant relief as to this amount and that we are therefore precluded from dealing with it. This simply is an erroneous reading of the Court's mandate to us to which we do not accede.

Transit believes it is entitled to recover the entire deficiency in its depreciation reserve[28] as of August 15, 1963, from the appreciation to be awarded the farepayers in *DCC-I* and *DCC-II*. This would be so if the accounting entries directed in Order No. 564 were reserved. The Report took a different approach; rather than reversing the accounting entries by which Transit was credited with $806,168 from the Riders' Fund, the Hearing Officer simply directed Transit to pay $806,168 in property appreciation into the Riders' Fund thereby recompensing the farepayers for their earlier advance. Transit was allowed to retain property appreciation of $252,688 to cover the balance of the depreciation deficiency. The result is that Transit has recovered the entire depreciation deficiency of $1,058,856. We see no reason to change the approach taken in the Report.

Taking account of the changes to the findings in the Report made by this decision, the sum available to cover

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[26] (WMATC, unreported) October 10, 1974.

[27] *Williams* v. *WMATC*, 134 U.S. App. D.C. 342, 415 F.2d 922 (D.C. *en banc*, 1968) *cert. denied* 393 U.S. 1081, 89 S.Ct. 860, 21 L.Ed.2d 773 (1969).

[28] The deficiency is $1,058,856 and not $1,099,627 as Transit claims.

the depreciation deficiency is $1,262,590, composed of the net gain on buildings alone as follows:

Central Garage	$ 235,805
Northeast Carhouse	33,981
Navy Yard Carhouse	168,776
M Street Shop	220,658
Grace Street Shop	62,116
General Office Building	541,254
Total	$1,262,590

After deducting $1,058,856, there remains $203,734 to be applied as directed in the *Democratic Central* cases.

Issues Peculiar To DCC-I

Transit believes the restitution granted the farepayers in *DCC-I* should be limited to $738,720. In Transit's view, the farepayers are entitled to recover from the net gain on the properties only the amount of the increased fares collected under Order No. 773 during the 277 days it was in effect. Transit therefore notes an exception to the Report's finding that the restitution to be awarded in *DCC-I* should be measured by the annual level of revenue increase authorized in Order No. 773 multiplied by the number of years that Transit continued utility operations subsequent to that order.

The Report discusses the "spill-over" concept and concludes that the fare increases in the rate orders that followed Order No. 773[29] were incremental to the Order No. 773 base:

> It seems impermissible therefore to offset those increases—over and above Order No. 773 levels—by credits for property appreciation. It

[29] Order No. 882 (WMATC, unreported) October 29, 1968; Order No. 984 (WMATC, unreported) October 24, 1969; and Order No. 1052 (WMATC, unreported) June 28, 1970.

> should be noted that the revenue requirement and fares established in Order No. 773 were never reduced. The later fare orders built on the base established in Order No. 773 and, in that sense, Order No. 773 was operative throughout Transit's life as a public utility as the foundation upon which all subsequent fare orders were built. Order Nos. 882, 984, and 1052 may be viewed as incremental to Order No. 773. (Report at 88)

We agree with the Report. The fare prescribed in Order No. 773 was the base fare for the increase in Order No. 882 and was included in the base fare from which Order Nos. 984 and 1052 took their impetus. To the extent that property appreciation could have been applied to reduce the amount of the fare increases in the rate orders that came after Order No. 773, Transit would not have been granted the fare increases prescribed by those orders.

Transit believes its investors are entitled to retain the appreciation in the property values to the extent of the difference between the net income authorized in Order No. 773 and actual net operating income. The Report addressed this contention and rejected it, and we agree with the reasoning expressed in the Report.

Transit also seeks to recover the deficit in operating income during operations under Order No. 984 from the appreciation in property values. In Order No. 984 the Commission authorized Transit to recover earnings shortfall resulting from operations under Order No. 984 up to $138,304 from the Riders' Fund. The Riders' Fund was in fact drawn upon to make up only $138,304 of the operating deficit.[30] As a result of these cases the Riders' Fund will be replenished. The issue posed is whether

[30] Order No. 1242 (WMATC, unreported) December 19, 1972.

Commission Decision

Transit may recover the balance of its Order No. 984 shortfall against property appreciation. We think not. Order No. 984 limited Transit's recourse for earnings shortfall to the $138,304 then in the Riders' Fund, which Transit has already been paid. Except for the "cost-of-living" issue, Order No. 984 has been upheld by the Court and our decision on the "cost-of-living" case (*D.C. Transit System, Inc.* v. *WMATC,* 485 F.2d 881) filed simultaneously with this decision recommends an award of $283,869 to Transit. This would further reduce the Order No. 984 earnings deficit.

The total amount available for restitution in *DCC-I* is $2,605,588 ($3,947,134 less $1,058,856 applied in *Bebchick-II* and less the equitable offset of $282,690 related to the General Office Building). This is sufficient to exhaust the award recommended herein.

If the farepayers' entitlement in *DCC-I* is limited to less than the total amount available, we recommend that the amount related to depreciable property ($205,734) be drawn upon first. Any balance then remaining should then be applied to *DCC-II* where the farepayers' entitlement is sufficient to exhaust it.

Transit's Equitable Arguments

Transit would offset the award to the farepayers in these proceedings by amounts—subsumed under various headings—which it believes it is entitled, in equity, to recover from the farepayers. These include: the $3,290,000 track-removal payment to the District of Columbia; a $1,673,727 deficiency in the Reserve for Injuries and Damages; an undetermined amount representing the fare increase that would have been granted in Order No. 1216[31] on the basis of Transit's assumption that recognition of property appreciation on its books would

[31] (WMATC, unreported) May 19, 1972.

have brought about a different result in that fare case; and finally, earnings shortfalls experienced under Order Nos. 882[32] and 1052.[33]

Whether these equitable claims are available to Transit and how they are resolved is for the Court, to whom Transit is hereby remitted.

Transit believes the amount of appreciation found to inhere in any single property should be limited to the depreciation expense in the year of transfer. In other words, Transit urges us to award its investors all the appreciation in the value of a property which exceeds the depreciation expense related to the property in the year of transfer. This purports to be an application of the policy of our Regulation 61-04. In fact it is not, since, under that regulation, the entire amount of accrued depreciation would be returned to the farepayers. Not content with this tortured interpretation of Regulation 61-04, Transit would have us further limit the year-of-transfer depreciation expense to some amount less than that booked if the authorized rate of return were not earned.

We emphatically reject Transit's position either with respect to the meaning of Regulation 61-04 or its applicability to this case. The Court's mandate is clear as to the method of calculation of the appreciation in value.

Transit seeks credit by way of an offset against the restitution award to the farepayers for the full amount of the costs assessed against it for the expenses of the Commission, plus all the costs and expenses it has incurred on its own behalf in connection with these proceedings. Transit argues that these proceedings are a reopening of prior rate proceedings in which costs and expenses are allowable charges, ultimately to be as-

[32] *Supra*, n. 29.
[33] *Supra*, n. 29.

sumed and paid by the farepayers. We agree, and will require Transit to submit proof of its costs and their reasonableness as part of the distribution phase. We have a similar task before us with respect to Mr. Bebchick.

Realization of Restitution

BUF requests us to enter a ruling on the previously argued motion pertaining to realization of restitution. The Report is correct in finding that we lack jurisdiction to rule on this request. However, we echo the recommendation in the Report "that the Court take appropriate steps to sequestor or encumber assets of Transit in an amount sufficient to fund the restitution award." (Report at 90) Transit, by counsel, offered assurances in its Reply to BUF's exceptions that it could and would carry out the final mandate of the Court in these proceedings.

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Commission Decision

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Table I

UNRECOVERED INVESTMENT PER COMMISSION

(1) Property	(2) Original Cost Per Books 08/15/56	(3) Depreciation Reserve 08/15/56	(4) Net Book Value 08/15/56 Col(2) minus Col(3)
Central Garage			
Land	$ 19,315	–	$ 19,315
Bldg.	427,778	$ 192,881	234,897
Total.	447,093	192,881	254,212
Fourth Street Shops			
Land	48,912	–	48,912
Bldg.	795,399	395,279	400,120
Total.	844,311	395,279	449,032
Southern Carhouse			
Land	40,177	–	40,177
Bldg.	243,347	120,933	122,414
Total.	283,524	120,933	162,591
Maryland Line Right-of-Way	4,301	–	4,301
Benning Line Right-of-Way	974	–	974
Northeast Carhouse			
Land	36,151	–	36,151
Bldg.	124,438	49,281	75,157
Total.	160,589	49,281	111,308
Cabin John Right-of-Way	85,621	–	85,621
Georgia and Eastern Terminal			
Land	31,199	–	31,199
Bldg.	20,399	6,134	14,265
Total.	51,598	6,134	45,464
14th and V Streets Substation			
Land	9,038	–	9,038
Bldg.	16,835	13,643	3,192
Total.	25,873	13,643	12,230
13th and D Streets Storage Yard	976	–	976
Navy Yard Carhouse			
Land	106,562	–	106,562
Bldg.	245,776	198,088	47,688
Total.	352,338	198,088	154,250
M Street Shop			
Land	65,793	–	65,793
Bldg.	281,035	222,651	58,384
Total.	346,828	222,651	124,177

(5) Improvements (Retirements) 08/15/56 to Date of Transfer	(6) Depreciation 08/15/56 to Date of Transfer	(7) Original Cost Per Books: Date of Transfer Col(2) plus Col(5)	(8) Depreciation Reserve Date of Transfer Col(3) plus Col(6)	(9) "Unrecovered Cost" Net Book Value Date of Transfer Col(7) minus Col(8)
–	–	$ 19,315	–	$ 19,315
–	$ 22,725	427,778	$ 215,606	212,172
–	22,725	447,093	215,606	231,487
–	–	48,912	–	48,912
$ 1,590	47,321	796,989	442,600	354,389
1,590	47,321	845,901	442,600	403,301
–	–	40,177	–	40,177
752	12,204	244,099	133,137	110,962
752	12,204	284,276	133,137	151,139
–	–	4,301	–	4,301
–	–	974	–	974
–	–	36,151	–	36,151
–	8,685	124,438	57,966	66,472
–	8,685	160,589	57,966	102,623
–	–	85,621	–	85,621
–	–	31,199	–	31,199
–	8,279	20,399	14,413	5,986
–	8,279	51,598	14,413	37,185
–	–	9,038	–	9,038
–	2,718	16,835	16,361	474
–	2,718	25,873	16,361	9,512
–	–	976	–	976
–	–	106,562	–	160,562
–	42,243	245,776	240,331	5,445
–	42,243	352,338	240,331	112,007
–	–	65,793	–	65,793
–	48,303	281,035	270,954	10,081
–	48,303	346,828	270,954	75,874

Table I

UNRECOVERED INVESTMENT PER COMMISSION (Continued)

(1) Property	(2) Original Cost Per Books 08/15/56	(3) Depreciation Reserve 08/15/56	(4) Net Book Value 08/15/56 Col(2) minus Col(3)
Grace Street Shop			
Land	$ 11,294	–	$ 11,294
Bldg.	152,703	$ 104,596	48,107
Total.	163,997	104,596	59,401
General Office Building.			
Land	44,127	–	44,127
Bldg.	839,071	504,463	334,608
Total.	883,198	504,463	378,735
Parking Lot	579	–	579
Trinidad Garage.			
Land	40,733	–	40,733
Bldg.	234,557	234,557	–
Total.	275,290	234,557	40,733
GRAND TOTALS	$3,927,090	$2,042,506	$1,884,584

(5) Improvements (Retirements) 08/15/56 to Date of Transfer	(6) Depreciation 08/15/56 to Date of Transfer	(7) Original Cost Per Books: Date of Transfer Col(2) plus Col(5)	(8) Depreciation Reserve Date of Transfer Col(3) plus Col(6)	(9) "Unrecovered Cost" Net Book Value Date of Transfer Col(7) minus Col(8)
–	–	$ 11,294	–	$ 11,294
–	$ 27,201	152,703	$ 131,797	20,906
–	27,201	163,997	131,797	32,200
–	–	44,127	–	44,127
$673,024	212,357	1,512,095	716,820	795,275
673,024	212,357	1,556,222	716,820	839,402
–	–	579	–	579
–	–	40,733	–	40,733
–	–	234,557	234,557	–
–	–	275,290	234,557	40,733
$675,366	$432,036	$4,602,456	$2,474,542	$2,127,914

Table II

DATE OF TRANSFER MARKET VALUES AND GROSS GAIN PER COMMISSION

(1) Property	(2) Date of Transfer	(3) Date of Transfer Market Value	(4) Unrecovered Investment (Per Table I)	(5) Gross Gain Col(3) minus Col(4)
Central Garage	09-30-58			
Land		$ 322,000	$ 19,315	$302,685
Bldg		610,200	212,172	398,028
Total		932,200	231,487	700,713
Fourth Street Shop	01-16-59			
Land		1,014,000	48,912	965,088
Bldg		–	354,389	(354,389)
Total		1,014,000	403,301	610,699
Southern Carhouse	01-16-59			
Land		833,500	40,177	793,323
Bldg		–	110,962	(110,962)
Total		833,500	151,139	682,361
Maryland Line Right-of-Way	04-30-59	13,350	4,301	9,049
Benning Line Right-of-Way	04-30-59	4,800	974	3,826
Northeast Carhouse	05-31-59			
Land		246,000	36,151	209,849
Bldg		136,000	66,472	69,528
Total		382,000	102,623	279,377
Cabin John Right-of-Way	01-31-60	179,272	85,621	93,651
Georgia and Eastern Terminal	10-31-60			
Land		182,050	31,199	150,851
Bldg		–	5,986	(5,986)
Total		182,050	37,185	144,865
14th and V Streets Substation	01-31-62			
Land		16,700	9,038	7,662
Bldg		7,100	474	6,626
Total		23,800	9,512	14,288
13th and D Streets Storage Yard	01-31-62	4,755	976	3,779
Navy Yard Carhouse	06-30-63			
Land		427,500	106,562	320,938
Bldg		239,000	5,445	233,555
Total		666,500	112,007	554,493

Table II

DATE OF TRANSFER MARKET VALUES AND GROSS GAIN PER COMMISSION (Continued)

(1) Property	(2) Date of Transfer	(3) Date of Transfer Market Value	(4) Unrecovered Investment (Per Table I)	(5) Gross Gain Col(3) minus Col(4)
M Street Shop	06-30-63			
Land		$ 660,000	$ 65,793	$ 594,207
Bldg		316,800	10,081	306,719
Total		976,800	75,874	900,926
Grace Street Shop	09-30-63			
Land		145,500	11,294	134,206
Bldg		88,500	20,906	67,594
Total		234,000	32,200	201,800
General Office Building	01-01-64			
Land		402,000	44,127	357,873
Bldg		1,713,000	795,275	917,725
Total		2,115,000	839,402	1,275,598
Parking Lot	01-01-64	14,900	579	14,321
Trinidad Garage	07-03-67			
Land		525,000	40,733	484,267
Bldg		–	–	–
Total		525,000	40,733	484,267
Total Land		$4,991,327$	$ 545,752	$4,445,575
Total Bldgs		$ 3,110,600	$1,582,162	1,528,438
GRAND TOTALS		$ 8,101,927	$2,127,914	$5,974,013

Table III

SALES EXPENSE PER COMMISSION

(1) Property	(2) Date Of Transfer	(3) Market Value	(4) I.R. Stamps	(5) D.C. Transfer Tax
Central Garage	09-30-58	$ 932,200	$1,025.42	
4th Street Shop	01-16-59	1,014,000	1,115.40	
Southern Carhouse	01-16-59	833,500	916.85	
Maryland Line	04-30-59	13,350	14.68	
Benning Line	04-30-59	4,800	5.28	
Northeast Carhouse	05-31-59	382,000	458.70	
Cabin John Line	01-31-60	179,272	197.20	
Georgia & Eastern Terminal	10-31-60	182,050	200.26	
14th & V Streets, N.W.	01-31-62	23,800	26.18	
13th & D Streets, N.W.	01-31-62	4,755	5.23	
Navy Yard Carhouse	06-30-63	666,500	733.15	$ 1,666.25
M Street Shop	06-30-63	976,800	1,074.48	2,442.00
Grace Street Shop	09-30-63	234,000	257.40	585.00
General Office Building	01-01-64	2,115,000	2,326.50	5,287.50
Parking Lot	01-01-64	14,900	11.44	26.00
Trinidad Garage	07-03-67	525,000	577.50	1,312.50
TOTALS		$8,101,927	$8,945.67	$11,319.25

* If May 1970 is adopted as date of transfer, market value becomes $500,000 and total sales expense is $29,889.

(6) Settlement Charge		(7) Brokerage Commission	(8) Appraisal Fee	(9) Attorney's Fee 3/8% of (3)	(10) Total Sales Expense Sum of (4) thru (9)
	%				
$ 25	4	$ 37,288.00	$ 1,000	$ 3,496.00	$ 42,834.42
25	3	30,420.00	1,250	3,803.00	36,613.40
25	4	33,340.00	1,250	3,126.00	38,657.85
25	10	1,335.00	50	50.06	1,474.74
25	10	480.00	50	18.00	578.28
25	5	19,100.00	750	1,433.00	21,766.70
25	6	10,756.50	2,000	672.00	13,650.70
25	–	–0–	–0–	–0–	225.26
25	–	–0–	–0–	–0–	51.18
25	10	475.50	50	18.00	573.73
25	5	33,325.00	1,000	2,499.00	39,248.40
25	4	39,072.00	1,250	3,663.00	47,526.48
25	–	–0–	–0–	–0–	867.40
25	3	63,450.00	2,500	7,931.00	81,520.00
25	10	1,490.00	100	56.00	1,708.44
25	5	26,250.00	1,250	1,968.75	31,383.75*
$400		$296,782.00	$12,500	$28,733.81	$358,680.73

Table IV

TAX EXPENSE PER COMMISSION

(1) Property	(2) Market Value (Table II)	(3) Tax Basis (Staff Ex. 34)
Central Garage		
Land	$ 322,000	$ 23,010
Bldg.	610,200	115,433
Total	932,200	138,443
Fourth Street Shop		
Land	1,014,000	58,272
Bldg.	–	203,251
Total	1,014,000	261,523
Southern Carhouse		
Land	833,500	47,867
Bldg.	–	62,433
Total	833,500	110,300
Maryland Line Right-of-Way	13,350	1,163
Benning Line Right-of-Way	4,800	5,122
Northeast Carhouse		
Land	246,000	43,069
Bldg.	136,000	31,564
Total	382,000	74,633
Cabin John Right-of-Way	179,272	79,990
Georgia and Eastern Terminal		
Land	182,050	37,168
Bldg.	–	4,864
Total	182,050	42,032
14th and V Streets Substation		
Land	16,700	10,765
Bldg.	7,100	3,547
Total	23,800	14,312
13th and D Streets Storage Yard	4,755	1,163
Navy Yard Carhouse		
Land	427,500	126,964
Bldg.	239,000	48,562
Total	666,500	175,526
M Street Shop		
Land	660,000	78,390
Bldg.	316,800	55,657
Total	976,800	134,047

(4) Sales Expense Table III (See Note)	(5) Taxable Gain (2)–[(3) + (4)]	(6) Tax Expense (5) × .2875
$14,795	$284,195	$ 81,706
28,039	466,728	134,184
42,834	750,923	215,890
36,613	919,115	264,246
–	(203,251)	(58,435)
36,613	715,864	205,811
38,658	746,975	214,755
–	(62,433)	(17,949)
36,658	684,542	196,806
1,475	10,712	3,080
578	(900)	(259)
14,017	188,914	54,313
7,750	96,686	27,797
21,767	285,600	82,110
13,651	85,631	24,619
225	144,657	36,164
–	(4,864)	(1,216)
225	139,793	34,948
36	5,899	1,475
15	3,538	884
51	9,437	2,359
574	3,018	868
25,174	275,362	79,166
14,074	176,364	50,705
39,248	451,726	129,871
32,112	549,498	157,981
15,414	245,729	70,647
47,526	795,227	228,628

TABLE IV

TAX EXPENSE
PER COMMISSION (Continued)

(1) Property	(2) Market Value (Table II)	(3) Tax Basis (Staff Ex. 34)
Grace Street Shop		
Land	145,500	13,459
Bldg.	88,500	30,241
Total.	234,000	43,700
General Office Building		
Land	402,000	52,576
Bldg.	1,713,000	567,161
Total.	2,115,000	619,737
Parking Lot	14,900	692
Trinidad Garage		
Land	525,000	48,529
Bldg.	–	39,581
Total.	525,000	88,110
Total Land	4,991,327	628,199
Total Bldgs	3,110,600	1,162,294
GRAND TOTALS	$8,101,927	$1,790,493

Note: Sales Expense, developed on a property-by-property basis in Table III, has been prorated between land and building in accordance with the ratio of the market value of each to the market value of the total property.

Tax Expense for the properties voluntarily sold has been calculated at the actual effective tax rate in the year of sale, giving effect to tax loss carryforwards and carrybacks available to Transit. Effective rates are: Georgia and Eastern Terminal 25 percent; 14th and V Substation 25 percent; and Grace Street Shop 8.89 percent.

If the Staff's theory of valuation of 4th Street Shop and Southern Carhouse is accepted, the "negative" tax expense on the buildings should not be recognized.

(4) Sales Expense Table III (See Note)	(5) Taxable Gain (2)–[(3) + (4)]	(6) Tax Expense (5) × .2875
539	131,502	11,691
328	57,931	5,150
867	189,433	16,841
15,495	333,929	96,005
66,025	1,079,814	310,446
81,520	1,413,743	406,451
1,708	12,500	3,594
31,384	445,087	127,963
–	(39,581)	(11,380)
31,384	405,506	116,583
227,034	4,136,094	1,157,367
131,645	1,816,661	510,833
$358,679	$5,952,755	$1,668,200

Table V

SUMMARY OF FINDINGS PER COMMISSION

(1) Property	(2) Date of Transfer Market Value (Table II)	(3) Unrecovered Investment (Table I)	(4) Gross Gain (2)–(3)
Central Garage			
Land	$ 322,000	$ 19,315	$ 302,685
Bldg	610,200	212,172	398,028
Total	932,200	231,487	700,713
Fourth Street Shop			
Land	1,014,000	48,912	965,088
Bldg	–	354,389	(354,389)
Total	1,014,000	403,301	610,699
Southern Carhouse			
Land	833,500	40,177	793,323
Bldg	–	110,962	(110,962)
Total	833,500	151,139	682,361
Maryland Line Right-of-Way	13,350	4,301	9,049
Benning Line Right-of-Way	4,800	974	3,826
Northeast Carhouse			
Land	246,000	36,151	209,849
Bldg	136,000	66,472	69,528
Total	382,000	102,623	279,377
Cabin John Right-of-Way	179,272	85,621	93,651
Georgia and Eastern Terminal			
Land	182,050	31,199	150,851
Bldg	–	5,986	(5,986)
Total	182,050	37,185	144,865
14th and V Streets Substation			
Land	16,700	9,038	7,662
Bldg	7,100	474	6,626
Total	23,800	9,512	14,288
13th and D Streets Storage Yard	4,755	976	3,779
Navy Yard Carhouse			
Land	427,500	106,562	320,938
Bldg	239,000	5,445	233,555
Total	666,500	112,007	554,493
M Street Shop			
Land	660,000	65,793	594,207
Bldg	316,800	10,081	306,719
Total	976,800	75,874	900,926

(5) Sales Expenses (Table IV)	(6) Net Gain Before Taxes (4)–(5)	(7) Tax Expense (Table IV)	(8) Net Gain (6)–(7)
$ 14,795	$ 287,890	$ 81,706	$ 206,184
28,039	369,989	134,184	235,805
42,834	657,879	215,890	441,989
36,613	928,475	264,246	664,229
–	(354,389)	(58,435)	(295,954)
36,613	574,086	205,811	368,275
38,658	754,665	214,755	539,910
–	(110,962)	(17,949)	(93,013)
38,658	643,703	196,806	446,897
1,475	7,574	3,080	4,494
578	3,248	(259)	3,507
14,017	195,832	54,313	141,519
7,750	61,778	27,797	33,981
21,767	257,610	82,110	175,500
13,651	80,000	24,619	55,381
225	150,626	36,164	114,462
–	(5,986)	(1,216)	(4,770)
225	144,640	34,948	109,692
36	7,626	1,475	6,151
15	6,611	884	5,727
51	14,237	2,359	11,878
574	3,205	868	2,337
25,174	295,764	79,166	216,598
14,074	219,481	50,705	168,776
39,248	515,245	129,871	385,374
32,112	562,095	157,981	404,114
15,414	291,305	70,647	220,658
47,526	853,400	228,628	624,772

Table V

SUMMARY OF FINDINGS PER COMMISSION (Continued)

(1) Property	(2) Date of Transfer Market Value (Table II)	(3) Unrecovered Investment (Table I)	(4) Gross Gain (2)–(3)
Grace Street Shop			
Land	$ 145,500	$ 11,294	$ 134,206
Bldg	88,500	20,906	67,594
Total	234,000	32,200	201,800
General Office Building			
Land	402,000	44,127	357,873
Bldg	1,713,000	795,275	917,725
Total	2,115,000	839,402	1,275,598
Parking Lot	14,900	579	14,321
Trinidad Garage			
Land	525,000	40,733	484,267
Bldg	–	–	–
Total	525,000	40,733	484,267
Total Land	4,991,327	545,752	4,445,575
Total Bldgs.	3,110,600	1,582,162	1,528,438
GRAND TOTALS	$8,101,927	$2,127,914	$5,974,013

* By stipulation of the parties, accepted by the Hearing Officer, the net gain after all expenses and taxes on the General Office Building is subject to an equitable offset in the amount of $282,690 for purposes of computing restitution to the farepayers in the *Democratic Central* cases.

(5) Sales Expenses (Table IV)	(6) Net Gain Before Taxes (4)–(5)	(7) Tax Expense (Table IV)	(8) Net Gain (6)–(7)
$ 539	$ 133,667	$ 11,691	$ 121,976
328	67,266	5,150	62,116
867	200,933	16,841	184,092
15,495	342,378	96,005	246,373
66,025	851,700	310,446	541,254
81,520	1,194,078	406,451	787,627*
1,708	12,613	3,594	9,019
31,384	452,883	127,963	324,920
–	–	(11,380)	11,380
31,384	452,883	116,583	336,300
227,034	4,218,541	1,157,367	3,061,174
131,645	1,396,793	510,833	885,960
$358,679	$5,615,334	$1,668,200	$3,947,134*

Table VI
EFFECTIVE TAX RATE BASED UPON RESTRUCTURING OF D.C. TRANSIT SYSTEM, INC.'S ACTUAL TAX RATES PER COMMISSION

Year	Percentage
1956	49.75
1957	51.17
1958	41.46
1959	35.07
1960	48.84
1961	—0—
1962	27.72
1963	8.89
1964	25.12
1965	—0—
1966	—0—
1967	—0—
1968	—0—
1969	—0—
1970	—0—
1971	—0—
1972	—0—

The effective tax rate has been derived from Staff Exhibit No. 35, Schedule 9. The notable adjustments occurred in 1959, Northeast Carhouse and Maryland Line; 1960, Cabin John Line Right-of-Way; and 1967, Trinidad Garage. The gain on sale for 1966 has been eliminated by our decision with respect to Brookland, Eastern and Trinidad garages. The adjustments impact the application of the net operating loss carryback to the years 1963 and 1964.

The effective tax rate is a composite percentage. To calculate the tax expense for any single property and, in *Bebchick-II,* the depreciable portion, the net gain before taxes should be multiplied by the rate, subject to a maximum of 25 percent.

Panel Majority

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21865

DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA, *et al.*, PETITIONERS

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, RESPONDENT

D.C. TRANSIT SYSTEM, INC., INTERVENOR

And Consolidated Cases Nos. 24398, 24415, 24428 and 75-1632

Supplemental Review Proceedings and Petitions for Review of Orders of the Washington Metropolitan Area Transit Commission

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Argued November 15, 1984

Decided March 15, 1988

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Panel Majority

Gilbert Hahn, Jr., with whom *Mary Kathleen Hite* was on the brief, for Black United Front, *et al.*, petitioner in No. 24428.

Landon G. Dowdey for Democratic Central Committee of the District of Columbia, *et al.*, petitioners in Nos. 21865 and 24398. *Beverly C. Moore, Jr.*, also entered an appearance.

Harvey M. Spear, with whom *Stanley J. Fineman* was on the brief, for D.C. Transit System, Inc., petitioner in No. 75-1632 and intervenor in Nos. 21865, 24398, 24415 and 24428. *Michael B. McGovern, C. Francis Murphy* and *Charles A. Camalier, III*, also entered appearances.

John H. Suda, Acting Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *Lutz Alexander Prager*, Deputy Assistant Corporation Counsel, were on the brief for District of Columbia, petitioner in No. 24415.

Donald J. Balsley, Jr., with whom *Gregory M. Barth*, and *Douglas N. Schneider, Jr.*, were on the brief, for Washington Metropolitan Area Transit Commission, respondent in Nos. 21865, 24398, 24415, 24428 and 75-1632.

Leonard N. Bebchick was on the brief for Leonard N. Bebchick, *et al.*, intervenors in No. 75-1632.

Before ROBINSON, *Circuit Judge*, MACKINNON, *Senior Circuit Judge*, and DAVIS, *Circuit Judge*.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

Dissenting Opinion filed by *Senior Circuit Judge* MACKINNON.

ROBINSON, *Circuit Judge*: Today we conclude yet another chapter in the protracted dispute between D.C. Transit, Inc. (Transit), formerly the franchiser of mass

* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

transportation services in the Washington metropolitan area,[1] and its patrons. The specifics of the controversy have been detailed in our prior decisions,[2] and need only be briefly recounted from time to time. In *Democratic Central Committee* v. *Washington Metropolitan Area Transit Commission* (*DCC I*)[3] and *Democratic Central Committee* v. *Washington Metropolitan Area Transit Commission* (*DCC II*)[4] we reviewed Orders Nos. 773[5] and 1052[6] of the Washington Metropolitan Area Transit Commission, which authorized, respectively, fare raises for Transit in 1968 and 1970. In those cases, we invalidated the increases and held that Transit's riders were

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[1] In 1956, Congress granted Transit an exclusive 20-year franchise to provide a mass transportation system in the District of Columbia and its environs. Franchise Act, Pub. L. No. 84-757, § 2, 70 Stat. 598 (1956). The term of the franchise was abbreviated in 1973 when Congress transferred this responsibility to a public authority. National Capital Area Transit Act of 1972, Pub. L. No. 92-517, 86 Stat. 999.

[2] See, e.g., *Powell* v. *Washington Metro. Area Transit Comm'n*, 158 U.S.App.D.C. 301, 302-304, 485 F.2d 1080, 1081-1083 (1973); *Democratic Cent. Comm.* v. *Washington Metro. Area Transit Comm'n (DCC II)*, 158 U.S.App.D.C. 107, 111-116, 485 F.2d 886, 890-895 (1973), *cert. denied*, 415 U.S. 935, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974); *Bebchick* v. *Washington Metro. Area Transit Comm'n (Bebchick II)*, 158 U.S.App.D.C. 79, 81-83, 485 F.2d 858, 860-862 (1973); *Democratic Cent. Comm.* v. *Washington Metro. Area Transit Comm'n (DCC I)*, 158 U.S.App.D.C. 7, 10-11, 485 F.2d 786, 789-790 (1973), *cert. denied*, 415 U.S. 935, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974).

[3] *Supra* note 2.

[4] *Supra* note 2.

[5] *D.C. Transit Sys., Inc.* (Order No. 773), 72 Pub. Util. Rep. (PUR) 3d 113 (WMATC 1968).

[6] *D.C. Transit Sys., Inc.* (Order No. 1052), 85 Pub. Util. Rep. (PUR) 3d 1 (WMATC 1970).

entitled to restitution for the overcharges.[7] We remanded to the Commission for computation of the amount of restitution, and retained jurisdiction in full.

Our task now is to evaluate the Commission's calculation of the restitution award and to resolve related issues raised by the parties. In Part I of this opinion, we consider the Commission's holding that Transit was sufficiently viable and efficient in 1970 to reap the benefit of a fare increase, and conclude that substantial evidence supports the Commission's findings in this regard. In Part II, we examine the Commission's identification of properties converted by Transit from operating to non-operating status, the Commission's computation of the amount of value appreciation on those properties, and the extent to which that amount should be shared by Transit's farepayers. In Part III, we allow the Commission reimbursement from the restitutionary fund for the expenses it incurred in connection with the remand, but hold that all other parties should bear their own costs. We decline to rule on the request for attorneys' fees at this time, and instead remand to the Commission for additional findings pertinent thereto.[8]

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[7] *DCC II*, *supra* note 2, 158 U.S.App.D.C. at 136, 485 F.2d at 915; *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 50, 485 F.2d at 829.

[8] The Commission did not respond to two matters we earlier remanded for its consideration. One was a recommendation respecting appropriate attorneys' fees for counsel for the Bebchick group. See *Bebchick* v. *Washington Metro. Area Transit Comm'n (Bebchick III)*, 207 U.S.App.D.C. 161, 171, 645 F.2d 1086, 1096 (1981). We have calculated and awarded those fees ourselves. *Bebchick* v. *Washington Metro. Area Transit Comm'n (Bebchick IV)*, 256 U.S.App.D.C. 296, 302-306, 805 F.2d 396, 402-406 (1986). The Commission also failed to submit recommendations for utilizing the restitutionary fund for the benefit of users of public transportation. See *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 48-49, 485 F.2d at 827-828. We will address that question at a future date after the amount of restitution is ascertained precisely.

Panel Majority

I. Efficiency and Viability

The Washington Metropolitan Area Transit Regulation Compact, under which Transit operated, stipulated that the Commission could not call upon farepayers to bear the cost of inefficient management,[9] and thus required the Commission to consider Transit's operating efficiency before authorizing any fare increase. We ourselves held that Transit's patrons could not be compelled to furnish a reasonable rate of return to investors if its operations were inherently unprofitable, and that therefore the Commission must satisfy itself that Transit was economically viable before allowing a higher fare.[10]

In *DCC II*, we concluded that the Commission did not discharge its duty to consider efficiency and viability when in 1970 it set a new fare in Order No. 1052.[11] We noted that the gravity of this omission was underscored by the Commission's denial of a 1972 fare increase because Transit did not meet the efficiency and viability criteria.[12] We directed the Commission to examine these factors on remand and tell us whether there was a lack of efficiency or viability in 1970.

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[9] Washington Metropolitan Area Transit Regulation Compact, tit. II, art. XII, § 6(a)(3), incorporated into Pub. L. No. 86-794, 74 Stat. 1031, 1040 (1960).

[10] *DCC II*, *supra* note 2, 158 U.S.App.D.C. at 129-133, 485 F.2d at 908-912.

[11] *Id.* at 134, 485 F.2d at 913.

[12] *Id.*; see *D.C. Transit Sys., Inc.* (Order No. 1216) (WMATC May 19, 1972), *aff'd*, 151 U.S.App.D.C. 223, 466 F.2d 394 (1972). The Commission's conclusions on Transit's 1972 operating status were derived from Financial Analysis of D.C. Transit System, Inc. (District of Columbia) and Subsidiaries Prepared by Pasquale A. Loconto for the Washington Metropolitan Area Transit Commission March 31, 1972, *reprinted in* Appendix to Brief for Petitioner Black United Front on Viability and Efficiency Issues.

In compliance, the Commission sponsored a study by Pasquale A. Loconto exploring Transit's efficiency and viability at the time of the 1970 fare increase.[13] Loconto had previously reported on Transit's 1972 operating condition, and that report had played a dispositive role in the Commission's decision to deny Transit's request for a fare increase that year.[14] In addition, a Commission hearing examiner conducted 96 days of testimony on Transit's 1970 financial status, which culminated in the issuance of a 448-page report on efficiency and viability issues.[15] The Commission, relying on the 1970 Loconto report and other evidence, upheld the hearing officer's finding that Transit was both efficient and viable in 1970.[16] Petitioner Black United Front (BUF) disputes this determination on several grounds.

BUF first contends that the Commission's holding that Transit was managed efficiently in 1970 is not supported by the record evidence. In this regard, BUF asserts that a comparison of the two Loconto reports reveals that the same features that led to the Commission's finding of managerial inefficiency in 1972 also appeared in the 1970 Loconto Report.[17] Our review of those two reports, as

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[13] A Financial Analysis of D.C. Transit System, Inc. (District of Columbia) and Subsidiaries as of April 15, 1970, *reprinted in* Appendix to Brief for Petitioner Black United Front on Viability and Efficiency Issues.

[14] See note 12 *supra* and accompanying text.

[15] Report of the Hearing Officer, *In re: Remands from the United States Court of Appeals for the District of Columbia of D.C. Transit Sys., Inc.* (July 30, 1980).

[16] Report of the Commission on the Issues of "Efficiency" and "Viability," *In re: Remands from the United States Court of Appeals for the District of Columbia of D.C. Transit Sys., Inc.* (Aug. 31, 1981) at 9-13, 40 [hereinafter Commission's Efficiency and Viability Report].

[17] Brief for Petitioner Black United Front on Viability and Efficiency Issues at 12.

well as the reports of the hearing officer and the Commission, leaves us in disagreement with BUF's contention. There is ample evidence in the record to underpin the Commission's conclusion that Transit's 1970 financial woes were caused, not by managerial inefficiencies, but by social factors beyond its control.[18] Accordingly, we affirm the Commission's ruling that Transit was efficiently managed at the time of the 1970 fare elevation.

BUF also argues that the Commission misconstrued the test of viability we articulated in *DCC II*.[19] Therein we stated that, in order to determine whether Transit was viable in 1970, the Commission should investigate and determine

> (a) if and to what extent the company would have been able to make a profit if there were no regulation at all, and (b) if and to what extent Transit could then earn a sufficient return so as to make it an attractive investment at any level of fares which could have been deemed "reasonable." [20]

In phrasing our test that way, we asked the Commission to assume that Transit was operating in a hypothetical unregulated environment, and to disregard the knowledge gained from hindsight of Transit's condition after 1970. The Commission found, on the basis of conservative financial estimates, that in 1970 Transit had the potential to continue to generate modest profits and thus it retained

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[18] Commission's Efficiency and Viability Report, *supra* note 16, at 9-13, 40. The Commission found that civil unrest following the assassinations of Dr. Martin Luther King, Jr., and Senator Robert F. Kennedy caused an unexpected disruption in bus service attributable to riders' fear of using buses and employees' refusal to operate them. Due in large part to these events, Transit suffered a $17 million revenue loss during 1968 and 1969. *Id.* at 12-13.

[19] *DCC II*, *supra* note 2, 158 U.S.App.D.C. at 132, 485 F.2d at 911.

[20] *Id.*

the interest of its shareholders and creditors.[21] We find that the Commission's determination of viability is based on substantial evidence, and that the Commission properly carried out our instructions.[22]

The Commission thus has cured its neglect of Transit's efficiency and viability when it promulgated Order No. 1052 by investigating and determining those matters on remand. It follows that Transit's farepayers are not entitled to any restitution on the now-refuted theory of a lack of efficiency or viability on Transit's part in 1970.

II. Property Issues

In *DCC I* and *DCC II*, we found that Orders Nos. 773 and 1052 were defective because the Commission had not considered the extent to which appreciation in the value of Transit's properties might have obviated the need to generate additional revenue through fare increases.[23] We

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[21] Commission's Efficiency and Viability Report, *supra* note 16, at 22-37. BUF contends that the criteria for viability we articulated required the Commission to gauge Transit's attractiveness to potential investors; that Transit's financial position disabled it from securing new investors; and consequently that Transit was nonviable as a matter of law. Brief for Petitioner Black United Front on Viability and Efficiency Issues at 22. We conclude that, given the nature of the task before it, the Commission was free to assess Transit's viability by measuring its capacity to reward present investors, from which its ability to attract new investors could reasonably be inferred.

[22] BUF has moved to strike the hearing officer's report on the ground of bias, stating that at the time the report issued the hearing officer had left his Commission post and was employed by a holding company for a regulated public utility. BUF submitted no other evidence of bias. We deny the motion because BUF's submission is too tenuous to demonstrate bias, and the "burden of establishing a disqualifying interest rests on the party making the assertion." *Schweiker* v. *McClure*, 456 U.S. 188, 196, 102 S.Ct. 1665, 1670, 72 L.Ed.2d 1, 8 (1982).

[23] *DCC II*, *supra* note 2, 158 U.S.App.D.C. at 119-123, 485 F.2d at 898-902; *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 43,

held that Transit's farepayers were entitled, as restitution for fares unjustly exacted, to the accrued appreciation in value of in-service properties subsequently converted to nonoperating status.[24] We instructed the Commission to determine the amount of restitution due the farepayers by first substracting the book value of each identified property from its market value at the time it was transferred out of service[25] and then deducting the expenses that would have been incidental to any contemporaneous sale of the property.[26]

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485 F.2d at 822. The rationale of these decisions was that any gain in the value of an in-service property should have inured to the farepayers' benefit on the date that property was removed from operation. *DCC II*, *supra* note 2, 158 U.S.App.D.C. at 119-123, 485 F.2d at 898-902; *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 43, 485 F.2d at 822; see note 25 *infra*. Thus, costs of service normally borne by Transit's riders had to be offset by any accrued appreciation before a fare at a particular level could be justified.

[24] We noted that the usual method of reimbursement for a fare overcharge—deduction of the excess from future fares—was no longer possible because Transit's transportation operations had ceased. *DCC II*, *supra* note 2, 158 U.S.App.D.C. at 134; 485 F.2d at 913; *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 44-45, 485 F.2d at 823-824. Accordingly, we concluded that restitution by Transit was the proper and only means for redressing the excessive fares. *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 45, 485 F.2d at 824.

[25] In *Bebchick II*, *supra* note 2, we similarly held that gains in value of operating properties should be credited to farepayers on the dates the properties were respectively transferred out of service, and not postponed until the properties were actually sold. "The properties," we said "had been, for all practical purposes, removed from the transportation business and now exist for the benefit of the investors . . . . The wisdom we apply is that of the bird in hand." 158 U.S.App. D.C. at 95, 485 F.2d at 874.

[26] *DCC II*, *supra* note 2, 158 U.S.App.D.C. at 134-135, 485 F.2d at 913-914; *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 43 n.343, 48, 485 F.2d at 822 n.343, 827.

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On remand, the Commission identified sixteen properties[27] and estimated the market value of each on the date of its transfer to nonoperating status. From the property's then market value, the Commission subtracted its net book value at the time it was acquired by Transit, and the brokerage fees and tax expenses that Transit likely would have incurred had the property been sold.[28] The Commission concluded that Transit's farepayers are entitled to the benefit of $3,947,134 in appreciation to offset the increase in fares.[29] Transit and petitioners BUF and Democratic Central Committee of the District of Columbia (DCC) dispute the Commission's action in numerous respects, and we now address their contentions in turn.

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[27] These properties were the Central Garage, the Fourth Street Shop, the Southern Carhouse, the Maryland Line Right-of-Way, the Benning Line Right-of-Way, the Northeast Carhouse, the Cabin John Right-of-Way, the Georgia & Eastern Terminal, the 14th & V Streets Substation, the 13th & D Streets Storage Yard, the Navy Yard Carhouse, the M Street Shop, the Grace Street Shop, the General Office Building, the Parking Lot and the Trinidad Garage. See Report of the Commission, *In re: Remands from the United States Court of Appeals for the District of Columbia Circuit of D.C. Transit Sys., Inc.* (June 30, 1978) Table I, *reprinted in* Joint Appendix (J. App.) vol. 1 [hereinafter Commission's Property Report]. The hearing officer had identified two additional properties, the Brookland Garage and the Eastern Garage, see Report of the Hearing Officer, *In re: Remands from the United States Court of Appeals for the District of Columbia Circuit of D.C. Transit Sys., Inc.* (Feb. 17, 1978) at 10 n.55, *reprinted in* J. App. vol. 1 [hereinafter Hearing Officer's Property Report], but the Commission determined that these were wrongly included. See text *infra* at notes 31-33.

[28] These figures are set forth in the Commission's Property Report, *supra* note 27, Tables I-V, J. App. vol. 1.

[29] *Id.* Table V, J. App. vol. 1. By stipulation of the parties, this figure is subject to a $282,690 equitable offset. *Id.* n.*, J. App. vol. 1; Hearing Officer's Property Report, *supra* note 27, at 50-52, J. App. vol. 1.

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A. *Identification Issues*

The first claim is that the Commission erred in identifying the properties to be included in the computation of the restitution award. BUF and DCC argue that the Brookland Garage and the Eastern Garage[30] were not used for operating purposes after September, 1966, and that therefore the farepayers should receive the benefit of value appreciation on those properties.[31] The Commission supports its exclusion of the two properties by adverting to its 1966 Order No. 634,[32] which directed Transit to retain the Brookland and Eastern Garages as operating properties in order to meet supplementary service requirements should they arise.[33] We agree that Order No. 634 is dispositive on the question of operating status of these properties and validates the Commission's decision to omit them from the calculation of accrued appreciation. The properties cannot be deemed to have been transferred out of operating status simply because the contingency for which they were held in service never occurred. We affirm the Commission's refusal to include the Brookland and Eastern Garages in the restitution calculus.

Transit argues that the Commission erred by counting the Fourth Street Shop, the Southern Carhouse and the Georgia & Eastern Terminal among the identified properties because, Transit says, the gains on those properties were allocated by earlier orders of the Commission and its predecessor, the Public Utilities Commission of the

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[30] See note 27 *supra*.

[31] See Brief for Petitioner Black United Front on Properties Issues at 15-22; Brief for Petitioner Democratic Central Committee on Transferred Properties at 20.

[32] *D.C. Transit Sys., Inc.* (Order No. 634) (WMATC Aug. 19, 1966), *reprinted in* J. App. vol. 4.

[33] *Id.* at 2, J. App. vol. 4.

District of Columbia (PUC).[34] Those orders, Transit asserts, have preclusive effect, and bar any allotment of gains on the three properties to farepayers.

Transit's contention impels us to examine closely the earlier orders and the contexts in which they arose. The Fourth Street Shop and the Southern Carhouse were transferred out of service in 1959 when they were purchased by the District of Columbia Redevelopment Land Agency at a price greatly in excess of their original cost to Transit.[35] PUC considered the gain realized upon their sale in Order No. 4577.[36] In the proceeding leading to that order, Transit requested an exception from standard public-utility accounting practices, which required all amounts received from the sale of depreciable property to be credited to the farepayers' depreciation reserve as salvage.[37] Transit argued that the properties' high selling price served to rebut the assumption underlying the standard practice, namely, that the value of depreciable property will decrease with time.[38] PUC credited $613,661.28 from the sale proceeds to the riders' depreciation reserve fund in order to compensate the farepayers for excessive depreciation accruals they had funded through payment of fares.[39] The remaining $837,210.75 of the gain realized from the sale of the depreciable portions of the properties, along with all of the gain on the land, was credited to Transit's earned surplus account,

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[34] Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 33.

[35] Hearing Officer's Property Report, *supra* note 27, at 29, J. App. vol. 1; see *D.C. Transit Sys., Inc.* (Order No. 4577), 30 Pub. Util. Rep. (PUR) 3d 405, 405 (PUC 1959), *aff'd*, 110 U.S.App.D.C. 241, 292 F.2d 735 (1961).

[36] *D.C. Transit Sys., Inc.* (Order No. 4577), *supra* note 35.

[37] 30 Pub. Util. Rep. (PUR) 3d at 410.

[38] *Id.*

[39] *Id.* at 411 & n.1.

and thus inured to the benefit of Transit's investors.[40] We affirmed PUC's disposition in 1961.[41]

The Georgia & Eastern Terminal was transferred out of service in 1960, and sold privately approximately two years later.[42] When the Commission was called upon to distribute the proceeds from the sale of the terminal in Order No. 563,[43] it credited all of the profit to Transit's earned surplus account.[44] The Commission's decision was not appealed.

In order to determine the effect of PUC's Order No. 4577 and the Commission's Order No. 563 on the problem before us, we are guided by venerable principles of issue preclusion. Generally, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment . . . the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[45] With but few exceptions, how-

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[40] *Id.* at 411.

[41] *D.C. Transit Sys., Inc.* v. *Public Utils. Comm'n*, 110 U.S. App.D.C. 241, 292 F.2d 735 (1961).

[42] Hearing Officer's Property Report, *supra* note 27, at 41 & n.133, J. App. vol. 1.

[43] *D.C. Transit Sys., Inc.* (Order No. 563), 63 Pub. Util. Rep. (PUR) 3d 32 (WMATC 1966).

[44] *Id.* at 33-34.

[45] Restatement (Second) of Judgments § 27 (1982). Accord, 18 C. Wright, A. Miller & E. Cooper, Federal Practice § 4416 (1981); see *Norfolk & W. Ry.* v. *United States*, 247 U.S. App.D.C. 256, 261, 768 F.2d 373, 378 (1985); *National Treasury Employees Union* v. *IRS*, 247 U.S.App.D.C. 20, 22, 765 F.2d 1174, 1176 (1985); *Jack Faucett Assocs.* v. *American Tel. & Tel. Co.*, 240 U.S.App.D.C. 103, 110, 744 F.2d 118, 125 (1984), *cert. denied*, 469 U.S. 1196, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985); *Western Coal Traffic League* v. *ICC*, 236 U.S. App.D.C. 377, 379, 735 F.2d 1408, 1410 (1984); *Stewart* v. *National Shopmen Pension Fund*, 235 U.S.App.D.C. 122, 126,

ever, issue preclusion cannot be asserted against a non-party to a prior proceeding,[46] and preclusive effect is given only to issues "actually litigated and . . . essential to the judgment" therein.[47] The party invoking the prior judgment as a barrier to relitigation has the burden of establishing that the conditions for preclusion have been satisfied,[48] and Transit has not met that burden here.

The allocation of the gain on the Fourth Street Shop and the Southern Carhouse in PUC's Order No. 4577 does not foreclose a reallocation in this case because the parties here are not identical to, or in privity with, the parties to the earlier litigation. Only Transit and the Commission—then PUC—were parties to the proceeding leading to Order No. 4577 and judicial review thereof;[49] the farepayers had no presence or representation therein

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730 F.2d 1552, 1556, *cert. denied*, 469 U.S. 834, 105 S.Ct. 127, 83 L.Ed.2d 68 (1984); *Otherson* v. *Department of Justice*, 228 U.S.App.D.C. 481, 487, 711 F.2d 267, 273 (1983).

[46] *Sea-Land Servs.* v. *Gaudet*, 414 U.S. 573, 593, 94 S.Ct. 806, 819, 39 L.Ed.2d 9, 25-26 (1974); *Ethnic Employees of Library of Congress* v. *Boorstin*, 243 U.S.App.D.C. 186, 190, 751 F.2d 1405, 1409 (1985); *Gerrard* v. *Larsen*, 517 F.2d 1127, 1132-1133 (8th Cir. 1975); *United States* v. *Brown*, 761 F.2d 1272, 1276 (9th Cir. 1985); Restatement (Second) of Judgments § 34(3) (1982).

[47] Restatement (Second) of Judgments § 27 (1982); see *IAM Nat'l Pension Fund* v. *Industrial Gear Mfg. Co.*, 232 U.S.App.D.C. 418, 423, 723 F.2d 944, 949 (1983); *Otherson* v. *Department of Justice*, *supra* note 45, 228 U.S.App.D.C. at 488, 711 F.2d at 274; *Nasem* v. *Brown*, 193 U.S.App.D.C. 416, 420, 595 F.2d 801, 805 (1979); *Tutt* v. *Doby*, 148 U.S. App.D.C. 171, 175, 459 F.2d 1195, 1199 (1972).

[48] See, e.g., *American Employers Ins. Co.* v. *American Sec. Bank*, 241 U.S.App.D.C. 379, 384, 747 F.2d 1493, 1498 (1984); *Allen* v. *Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982).

[49] See *D.C. Transit Sys., Inc.* (Order No. 4577), *supra* note 35; *D.C. Transit Sys., Inc.* v. *Public Utils. Comm'n*, *supra* note 41.

at all. While a nonparty may under certain conditions be bound when "[a]n official or agency invested by law with authority to represent the person's interests" was a party to the first proceeding,[80] that proposition can have no bearing here. PUC's representation of the public interest was not exclusively for farepayers and the many battles fought by citizens against fare increases for Transit[81] illustrate that the Commission's representation of them was clearly less than the advocacy of private parties.[82] Furthermore, it would be unfair to now forestall farepayers simply on the basis of PUC's participation in the earlier proceeding because the interests of PUC and Transit's farepayers differed markedly.[83] The

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[80] Restatement (Second) of Judgments § 41(1)(d) (1982).

[81] See, e.g., *Powell* v. *Washington Metro. Area Transit Comm'n*, *supra* note 2; *Bebchick II*, *supra* note 2; *Williams* v. *Washington Metro. Area Transit Comm'n*, 134 U.S.App. D.C. 342, 415 F.2d 922 (*en banc* 1968), *cert. denied*, 393 U.S. 1081, 89 S.Ct. 860, 21 L.E.2d 773 (1969); *Payne* v. *Washington Metro. Area Transit Comm'n*, 134 U.S.App.D.C. 321, 415 F.2d 901 (1968).

[82] The American Law Institute distinguishes between agencies granted exclusive authority to litigate on behalf of the public and agencies whose legal authority coexists with that of private citizens. Restatement (Second) of Judgments § 41 comment d (1982). As to the former, no question of preclusion can arise because individuals have no standing to sue. *Id.* As to the latter, one must determine whether the agency's action preempts individual action. *Id.* Non-preemptive agency action does not prevent a later suit by an individual. *Id.* § 41 comment d & illustration 7.

[83] See *Consumers Union* v. *Consumer Prod. Safety Comm'n*, 192 U.S.App.D.C. 93, 101-102, 590 F.2d 1209, 1217-1218 (1978) (a reverse-FOIA action defended by the Consumer Product Safety Commission does not bar a later FOIA action by a consumer group because the Commission and the consumers have divergent interests), *rev'd on other grounds sub nom. GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375, 100 S.Ct. 1194, 63 L.Ed.2d 467 (1980).

position advanced by DCC and BUF in the *DCC* cases—that all in-service property appreciation should be allocated to farepayers—was not advocated by PUC when it issued Order No. 4577, and was in fact opposed by the Commission, its successor, both in *DCC I* and *DCC II*. Our *DCC* holdings cannot be frustrated by a prior proceeding in which the farepayers had no meaningful voice.

The allocation of the gain from the sale of the Georgia & Eastern Terminal in Order No. 563 similarly fails to bind the parties here. While the interests of farepayers were represented in the proceeding culminating in that order, the question of proper allocation of in-service appreciation was neither actually litigated nor necessary to the outcome thereof. Order No. 563 was precipitated by this court's determination in *D.C. Transit System, Inc.* v. *Washington Metropolitan Area Transit Commission*[54] that any gain realized on depreciable property sold in consequence of Transit's termination of trolley service must be used to offset the farepayers' liability for losses suffered on other property conveyances occasioned by the conversion from a trolley-bus to an all-bus system.[55] We remanded to the Commission to enable it to determine whether the profitable sale of the Georgia & Eastern Terminal was a result of the conversion and, if so, to "address itself to the question . . . whether the riders should be afforded some participation in the benefits of the sale."[56] There is no indication that the parties litigated any other issue on remand. The Commission found that "the sale of the terminal was occasioned neither in whole nor in part by the abandonment of rail operations,"[57] but went further, however, to say that "the

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[54] 121 U.S.App.D.C. 375, 350 F.2d 753 (*en banc* 1965).

[55] *Id.* at 397-398, 350 F.2d at 775-776.

[56] *Id.* at 398, 350 F.2d at 776.

[57] *D.C. Transit Sys., Inc.* (Order No. 563), *supra* note 43, 63 Pub. Util. Rep. (PUR) 3d at 34.

ratepayer is not entitled to a share in any portion of the proceeds of that sale, unless there was a profit on the depreciable portion of the asset sold. There was none in this case." [58]

We decline to give the latter statement any preclusive effect with regard to the existence or ultimately proper allocation of in-service value appreciation of the Georgia & Eastern Terminal. The question of allocation was not raised or litigated by the parties,[59] and a determination of that matter was not essential to the Commission's decision, for once it found that the Georgia & Eastern sale was not prompted by the conversion, the purpose of this court's remand was achieved.[60] Under these circumstances, we refuse to accept the Commission's inconsequential observation in Order No. 563 as a barrier to the farepayers' endeavor here.

The absence of preclusion does not, however, lead us to allocate the entire gain on these three properties to the farepayers. When PUC issued Order No. 4577, it directed that $613,661.28 of the gain realized on the sale of the Fourth Street Shop and the Southern Carhouse be credited to Transit's depreciation reserve,[61] and that credit redound to the benefit of the farepayers. Consequently, our calculation of the farepayers' entitlement

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[58] *Id.*

[59] See, e.g., *American Employers Ins. Co.* v. *American Sec. Bank*, *supra* note 48, 241 U.S.App.D.C. at 384, 747 F.2d at 1498; *Allen* v. *Zurich Ins. Co.*, *supra* note 48, 662 F.2d at 1166; *Diplomat Elec., Inc.* v. *Westinghouse Elec. Supply Co.*, 430 F.2d 38, 45 (5th Cir. 1970); *Hunter Douglas, Inc.* v. *Sheet Metal Workers Int'l Ass'n*, 553 F.Supp. 324, 326-327 (M.D.N.C. 1982), *aff'd*, 714 F.2d 342 (4th Cir. 1983).

[60] See, e.g., *American Employers Ins. Co.* v. *American Sec. Bank*, *supra* note 48, 241 U.S.App.D.C. at 384, 747 F.2d at 1498; *Consumer Prod. Safety Comm'n* v. *Anaconda Co.*, 193 U.S.App.D.C. 160, 168, 593 F.2d 1314, 1322 (1979).

[61] See text *supra* at notes 38-39.

must be reduced by an equivalent amount to avoid a double benefit.

B. *Calculation of Gains*

Petitioners raise four issues concerning the Commission's computation of gains by appreciation of the identified properties. We consider each of these disputes seriatim, and find that the Commission ruled correctly in most respects but erred in several.

1. *Accounting Methods*

Transit contends that in calculating the gain allocable to farepayers, the Commission should have employed the "market-to-market" method of accounting[62] rather than the "book-to-market" method.[63] Because the market value of the properties exceeded their book value—their cost to Transit—at the time they were acquired, Transit asserts that the book-to-market method denies it the benefit of bargain purchases.[64] We have weighed and rejected this very argument in both of our prior *DCC* decisions. In *DCC I*, we told the Commission to compute the "dollar amount of restitution . . . by subtracting the book value of the properties from the market value at the time of the transfer."[65] Similarly, in *DCC II*, we directed the Commission to calculate "the amount of the increase in

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[62] This method involves calculation of the gain by subtracting the market value of the property when it was placed in service from its market value when it was taken out of service.

[63] This method uses as the subtrahend cost or book value of the property when it was entered into service rather than the market value at that time.

[64] See Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 20-32.

[65] *DCC I*, *supra* note 2, 158 U.S.App.D.C. 48, 485 F.2d at 827.

market value over book value of lands which Transit" transferred out of service.[66] On remand, the Commission heeded our instructions, and we can see no reason to reconsider them now.

2. *Value of the Fourth Street Shop and the Southern Carhouse*

As we have mentioned, the Fourth Street Shop and the Southern Carhouse were sold under threat of condemnation to the District of Columbia Redevelopment Land Agency for a combined price of $2,954,693.[67] On remand, the Commission decided that for purposes of restitution it would calculate appreciation on these properties by utilizing their market value, rather than their actual selling price, at the time. The Commission found that the selling price did not accurately reflect true market value since the sale took place in the presence of a looming prospect of condemnation.[68] On this account, the Commission based its computation of gain upon its expert's estimate of their combined market value of $1,847,500[69] when the sale occurred. BUF objects to the use of estimated market values for properties sold simultaneously with their transfer out of service,[70] and argues in the alternative that the Commission should simply have accepted the actual sale price of the two

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[66] *DCC II*, *supra* note 2, 158 U.S.App.D.C. at 135, 485 F.2d at 914.

[67] Hearing Officer's Property Report, *supra* note 27, at 30, J. App. vol. 1.

[68] Commission's Property Report, *supra* note 27, at 14-15, J. App. vol. 1; Hearing Officer's Property Report, *supra* note 27, at 33-34, J. App. vol. 1.

[69] Hearing Officer's Report, *supra* note 27, at 34, J. App. vol. 1.

[70] See Brief for Petitioner Black United Front on Properties Issues at 23-26.

properties as conclusive evidence of their market value.[71] We hold that, for the purpose of calculating the gain allocable, the sale price should have been employed.

The Commission misconceived the role of market value in determining the amount due farepayers as restitution. Generally speaking, estimated market value is pertinent, only because—and only to the extent that—we lack a selling price for the date pertinent.[72] With respect to the two properties under discussion, however, the selling price is available, and its use is more appropriate because it provides precisely the information that only less dependably could be sought by an appraisal of market value. Had the appraiser's estimate of market value exceeded the actual sale price, it would have been unfair to require Transit to make restitution in an amount greater than the profit actually realized; by the same token, Transit is not entitled to a windfall merely because the sale price of the Fourth Street Shop and the Southern Carhouse exceeded market value by more than $1 million.[73]

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[71] See Brief for Petitioner Black United Front on Properties Issues at 23-29.

[72] Thus we view as irrelevant the decisions cited by BUF and Transit concerning the place of condemnation awards in assessing the fair market value of a comparable property. See Answering Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 17 (discussing *District of Columbia Redev. Land Agency* v. *61 Parcels of Land*, 98 U.S.App.D.C. 367, 235 F.2d 864 (1956)); Brief for Petitioner Black United Front on Properties Issues at 26-27 (discussing *Nash* v. *District of Columbia Redev. Land Agency*, 129 U.S.App.D.C. 348, 395 F.2d 571 (1967), *cert. denied*, 393 U.S. 844, 89 S.Ct. 127, 21 L.Ed.2d 115 (1968)).

[73] See notes 67, 69 *supra* and accompanying text. Normally, it would be expected that property sold under threat of condemnation would command a price below market value. Apparently the Commission also wondered about the anomalous result witnessed here, see Commission's Property Report, *supra* note 27, at 14-15, J. App. vol. 1, but the staff's probing

The theory underlying our *DCC* decisions [74] dictates the conclusion that farepayers should receive the benefit of the actual gain on the properties in this instance.[75]

3. *Brokerage Fees and Taxes on the Sale of the Fourth Street Shop and the Southern Carhouse*

BUF lofts a similar objection to the Commission's allowance of deductions for theoretical brokerage fees and federal taxes in connection with the sale of the Fourth Street Shop and the Southern Carhouse.[76] Since Transit paid no brokerage fees or taxes when it sold these properties, BUF argues that the Commission should not have permitted deductions for these theoretical expenses.[77] We

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uncovered no explanation, *id.*, J. App. vol. 1. The hearing officer mistakenly believed that the sale price and the estimated market value yielded net gain figures that were "very close" to each other. See Hearing Officer's Property Report, *supra* note 27, at 34, J. App. vol. 1. This erroneous conclusion stemmed from a failure to deduct the depreciated cost of buildings from the estimated gain. The officer's comparison also, without comment, assumed that the $613,661.28 previously credited to Transit's earned surplus account in Order No. 4577, see text *supra* at note 39, would be subtracted from the sale price but not from the estimated value. We cannot know whether or to what extent these inconsistencies affected the officer's decision on the valuation of these two properties.

[74] *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 26-32, 485 F.2d at 805-811 (concluding that farepayers should benefit to the full extent of gain on the properties). Accord, *DCC II*, *supra* note 2, 158 U.S.App.D.C. at 119, 485 F.2d at 398.

[75] Of course, our decision on this issue does not affect the market values used by the Commission to calculate gains on the other properties, as none of the others was sold simultaneously with removal from operating status.

[76] Brief for Petitioner Black United Front on Properties Issues at 29-31.

[77] Brief for Petitioner Black United Front on Properties Issues at 30.

agree with BUF that only brokerage fees actually paid should be subtracted from amount of appreciation due farepayers. Because, however, taxes on the sale were merely deferred, not forgiven, we hold that tax expenses on the two properties should be computed in the manner we later prescribe for the other identified properties.[78]

Our decision that a deduction for brokerage fees should be limited to those actually paid follows from our ruling that the actual net sale price for the properties guides the amount of restitution to which farepayers are entitled. In *DCC I*, we directed the Commission to calculate the net gain on the identified properties by subtracting from the amount of value appreciation "the taxes and sale expenses which would have been deducted from Transit's profit if the assets had been sold outright instead of simply being moved into nonoperating status."[79] Here again we need not use an estimate, for the properties were "sold outright" on the same day they were moved "below the line"—that is, from operating to nonoperating status. Since the sale under scrutiny was effected without payment of any brokerage fee, the Commission's allowance of a deduction for such a fee conferred a windfall on Transit.[80]

Tax expenses are distinguishable from other sales costs in one important respect. Federal tax liability on the sale of the Fourth Street Shop and the Southern Carhouse was deferred because Transit invested the proceeds from the sale in "like-kind property."[81] Unlike

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[78] See text *infra* at notes 90-99.

[79] *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 43 n.343, 485 F.2d at 822 n.343. We incorporated this instruction in *DCC II*, *supra* note 2, 158 U.S.App.D.C. at 135, 485 F.2d at 914.

[80] See note 82 *infra*.

[81] Internal Revenue Code § 1033 permitted tax deferral in certain situations where proceeds from an involuntary conversion of property are invested in similar property. 26 U.S.C. § 1033 (1982).

brokerage fees, which will never be paid, taxes attributable to the gain on these properties will ultimately fall on Transit when it disposes of the replacement properties.[82] Consequently, the tax liability on these properties should be deducted from the amount payable to farepayers as restitution.

4. *Capital Gains Tax Calculations*

In the *DCC* cases, we remanded to the Commission with instructions to calculate the capital gains taxes on all appreciated properties, and to deduct the amount thereof from the farepayers' restitution award.[83] The Commission computed the tax expense prospectively, reckoning that future dispositions could result in a 28.75 percent tax rate on property appreciation, and concluding that Transit was entitled to a deduction for taxes at that rate.[84] The farepayers attack this calculation from several quarters.

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[82] Under § 1033, the basis of the involuntarily converted property carries over to the replacement property. *Id.* Thus, the gain on the original property, though not recognized at the time of conversion, will become subject to taxation at the time of disposition of the replacement property.

Transit and the Commission argue that since the sale proceeds were invested in like-kind property and in a future sale of the replacement property Transit may incur brokerage fees, deduction of an imputed fee on the original conveyance is now appropriate. We disagree. Brokerage fees are assessed on the total sale price of property, and are not affected by the amount of gain realized on the sale. Since it will be immaterial, for purposes of computing the brokerage fee upon sale of the replacement property, that no such fee was paid on the original sale of the Fourth Street Shop and the Southern Carhouse, we see no reason to impute any portion of future fees to the sale in question.

[83] See note 79 *supra* and accompanying text.

[84] Commission's Property Report, *supra* note 27, at 22, J. App. vol. 1. The hearing officer had recommended a tax deduction rate of 25%, based on the highest marginal federal

Panel Majority

BUF and DCC first challenge Transit's entitlement to any deduction at all for capital gains taxes. They note that farepayers have already been required to shoulder Transit's tax burden in the form of increased fares, since each rate escalation included a component to compensate for additional income taxes generated thereby.[85] They further contend that Transit stands to benefit from a substantial tax deduction when it makes restitution.[86] These parties therefore insist that fairness militates against any requirement that farepayers take on Transit's capital gains taxes.

We believe that these arguments overlook a key factor. It is true that the Commission, during Transit's operating years, set fares at a level sufficient to produce enough revenue to cover Transit's income tax expenses. BUF and DCC, however, fail to acknowledge that restitution will reimburse farepayers for the totality of fare excessiveness. Farepayers thus will be made whole once the process of restitution is completed.

We also remain unpersuaded by the farepayers' assertion that no liability on their part for taxes need be rec-

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rate in effect at the time the properties were removed from operating status. Hearing Officer's Property Report, *supra* note 27, at 74, J. App. vol. 1. The Commission felt that the deduction should reflect the additional 3.75% capital gains tax now imposed by the District of Columbia, since, although this tax was not in effect at the time properties were taken out of service, it was subsequently enacted and would be imposed when later they were conveyed. Commission's Property Report, *supra* note 27, at 22, J. App. vol. 1.

[85] See Brief for Petitioner Democratic Central Committee on Transferred Properties at 10; Answering Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation, Appendix 1 at 19.

[86] See Brief for Petitioner Black United Front on Properties Issues at 31-39; Brief for Petitioner Democratic Central Committee on Transferred Properties at 9-17.

ognized because Transit stands to recoup tax expenses through deduction of the restitution award. We put aside an identical contention in *Bebechick III*,[87] stating that "[a]s for the taxes to be saved by Transit in the future years in which it pays restitution . . ., we cannot calculate that saving or even [determine whether] it will exist."[88] Furthermore, petitioners' argument is foreclosed by our determination in *DCC I* that Transit is entitled to offset its capital gains liability from the amount owing to farepayers.[89] We find nothing new in the farepayers' current objection, and hold that estimated capital gains taxes should be deducted from the restitution award.

The second objection, pressed only by BUF, relates to the Commission's computation of the deduction for capital gains taxes. BUF insists that the Commission erred in predicating its calculation on anticipated future transfers of the properties,[90] since we directed formulation of the deduction on the basis of the taxes Transit would have paid had it sold the properties on the dates they were taken out of service.[91] The Commission endeavors to support its methodology by noting that "Transit cannot roll back the clock and sell the properties when the rates were lower or tax advantages would have been available,"[92] and by arguing further that had property appreciation been taken into account when it authorized

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[87] *Supra* note 8.

[88] 207 U.S.App.D.C. at 167, 645 F.2d at 1092.

[89] *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 43 n.343, 485 F.2d at 822 n.343.

[90] See note 84 *supra* and accompanying text.

[91] Brief for Petitioner Black United Front on Properties Issues at 40-41.

[92] Brief for Respondent Washington Metropolitan Area Transit Commission on Properties Issues at 43.

the fare increases, it would have computed the tax offset at the highest prospective marginal rate.[93] We agree with BUF that the taxes should have been calculated as if the properties were actually sold on the dates they respectively shed their operating status, and we must remand to the Commission for recalculation of the tax offsets accordingly.

In our *DCC* cases, we ordered the Commission to compute and subtract from the restitution award "the taxes . . . which would have been deducted from Transit's profit if the assets had been sold outright instead of simply being moved into nonoperating status."[94] This harmonized with our admonition in *Bebchick II*[95] that any recovery by farepayers must "tak[e] into account taxes and costs which might have reduced the gain if the properties had been sold."[96] In light of this clear mandate, the Commission erred in calculating Transit's tax offset by considering the assumed impact of hypothetical sales at wholly uncertain points in the future. The mere fact that the Commission would have deducted prospective taxes had it given attention to property appreciation in the formulation of the contested fare orders does not persuade us that it should do so now. Indeed, when confronted by the same argument in *Bebchick III*, we declared that "it is wholly reasonable to make a hypothetical recalculation of Transit's taxes *for the transfer years* to see what tax impact the assumed gain would presumptively have had. There is no compelling need to try to compute the burden Transit will actually bear

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[93] *Id.* at 41 & n.104.

[94] *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 43 n.343, 485 F.2d at 822 n.343. Accord, *DCC II*, *supra* note 2, 158 U.S. App.D.C. at 135, 485 F.2d at 914.

[95] *Supra* note 2.

[96] 158 U.S.App.D.C. at 97, 485 F.2d at 876.

when it comes to sell the property." [97] Given the similarity of our directives in *Bebchick II* and the *DCC* cases, we think the rationale of *Bebchick III* controls here.

We therefore will remand to the Commission for recomputation of the tax offset on the basis of Transit's tax posture in the years during which the identified properties were respectively transferred out of service. The offset should reflect Transit's actual tax rate, and as well any credits or deductions that were available to Transit for the operative periods.[98] The hearing officer entertained detailed testimony from a Commission staff member on Transit's tax position during the years that properties were removed from service. The Commission would be well advised to draw upon this evidence in the calculation of Transit's deductible tax expenses.[99]

C. *Calculation of Restitution*

In the previous sections of this opinion, we have delineated the methodology appropriate for computation of the amount of value appreciation available for inclusion in an award of restitution. Transit and BUF seek adjustments in the restitutional amount. Transit argues that the amount of restitution in *DCC I* should be limited to $738,720; that Transit should be permitted to set bus

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[97] *Bebchick III*, *supra* note 8, 207 U.S.App.D.C. at 167, 645 F.2d at 1092 (emphasis added).

[98] The hearing officer refused to consider the extent to which Transit's tax liabilities during the transfer years could be offset by net operating losses that could have been carried back to lessen them. Hearing Officer's Property Report, *supra* note 27, at 74-75, J. App. vol. 1. We believe that loss carrybacks, and all other available forms of tax relief, should be taken into account in calculation of the offset.

[99] See *Bebchick III*, *supra* note 8, 207 U.S.App.D.C. at 168, 645 F.2d at 1093 (directing Commission to utilize such estimates when computing the tax offset).

maintenance and cost-of-living expenses off against the amount of restitution; and that Transit is entitled to additional offsets by reason of equitable considerations. BUF asks for interest on the award of restitution. We now consider each of these claims.

1. *Amount of Restitution Available in DCC I*

Transit urges us to limit restitution in *DCC I* to $738,720, the aggregate of excess fares collected during the period in which the invalid fare raise allowed by Order No. 773 was in effect.[100] Since this order superseded, and was in turn superseded by, rate orders that were never appealed by the farepayers, Transit argues that the Commission's recommended award of $2,605,588 as restitution in that case violates principles of claim preclusion by reopening fare proceedings that were never challenged in court, and thereby deprives Transit of its property without due process of law.[101] We find these contentions unavailing.

Order No. 773 went into effect on January 28, 1968,[102] and was replaced 277 days later by Order No. 882.[103] Two further fare increases were authorized while Transit remained in operation under its franchise.[104] The hearing officer and the Commission found that the fare set in Order No. 773—the subject of review in *DCC I*—served as the base fare for all subsequent orders, and thus that its effect persisted until Transit ceased transporta-

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[100] Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 52.

[101] *Id.* at 52-59.

[102] Hearing Officer's Property Report, *supra* note 27, at 86, J. App. vol. 1.

[103] *Id.*, J. App. vol. 1.

[104] *Id.* at 87-88, J. App. vol. 1. The latter of the two is Order No. 1052, the subject of review in *DCC II*.

tion operations.[105] We agree with the Commission that the maximum amount of restitution allowable in *DDC I* is the fare increment authorized by Order No. 773 over the remainder of Transit's life as a public utility.[106] This conclusion does not disturb any authorization of an additional fare increase following Order No. 773, and thus raises no issue of preclusion or due process.[107]

2. *Bus Maintenance and Cost-of-Living Allowances*

Transit asks us to deduct from the amount of restitution the sums owed Transit for bus maintenance and cost-of-living allowances. In *Bebchick II*, we held that the Commission had undercompensated Transit for its expenditures for maintenance of its buses, and that Transit

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[105] The Commission quoted from the hearing officer's report in that regard:

> "It should be noted that the revenue requirement and fares established in Order No. 773 were never reduced. The later fare orders built on the base established in Order No. 773 and, in that sense, Order No. 773 was operative throughout Transit's life as a public utility as the foundation upon which all subsequent fare orders were built. Orders Nos. 882, 984, and 1052 may be viewed as incremental to Order No. 773."

Commission's Property Report, *supra* note 27, at 26 (quoting Hearing Officer's Property Report, *supra* note 27, at 88, J. App. vol. 1), J. App. vol. 1.

[106] The hearing officer estimated the amount of restitution at $4,820,000. Hearing Officer's Property Report, *supra* note 27, at 88, J. App. vol. 1.

[107] Because of our disposition of this issue, we need not discuss the Commission's alternative theory that any excess award calculated in *DCC I* may be carried over to supplement the restitution amount in *DCC II*. See Commission's Property Report, *supra* note 27, at 28, J. App. vol. 1; Hearing Officer's Property Report, *supra* note 27, at 89, J. App. vol. 1.

was entitled to recoup the balance.[108] In a related case, we ruled that Transit was entitled to reimbursement for additional expenses of labor it incurred under a cost-of-living escalation clause in its bargaining agreement.[109] Transit has requested that these sums be subtracted from the amount of restitution emanating from either *Bebchick III* or this proceeding.[110] Since the bus maintenance offset has already been allowed in *Bebchick IV*,[111] we need only consider whether Transit is entitled to deduct the extra cost-of-living expenses from the restitution award herein.

In *D.C. Transit System, Inc.* v. *Washington Metropolitan Area Transit Commission*,[112] we ordered that the added expense attributable to the cost-of-living clause "be set off against whatever amounts . . . are determined to be necessary to restore to the farepayers through the equitable restitutional remedies mandated" in other Transit cases.[113] We think it appropriate to permit that offset here. The sum of $283,869,[114] representing this item

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[108] *Bebchick II*, *supra* note 2, 158 U.S.App.D.C. at 89, 485 F.2d at 868. The Commission later determined this to be $273,060. See *Bebchick IV*, *supra* note 8, 256 U.S.App.D.C. at 300 n.14, 805 F.2d at 400 n.14.

[109] *D.C. Transit System, Inc.* v. *Washington Metro. Area Transit Comm'n*, 158 U.S.App.D.C. 102, 107, 485 F.2d 881, 886 (1973). The amount due Transit on labor costs was subsequently calculated at $283,869. See *Bebchick IV*, *supra* note 8, 256 U.S.App.D.C. at 300 n.15, 805 F.2d at 400 n.15.

[110] Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 79.

[111] *Bebchick IV*, *supra* note 8, 256 U.S.App.D.C. at 300 & n.14, 805 F.2d at 400 & n.14.

[112] *Supra* note 109.

[113] 158 U.S.App.D.C. at 107, 485 F.2d at 886.

[114] See note 109 *supra*.

will accordingly be subtracted from the amount of restitution ultimately found due.

3. *Equitable Considerations*

Transit advances five grounds upon which it contends that equitable adjustments in the amount of restitution are in order. First, Transit maintains that the restitution should not be computed in a manner that would deprive its investors of a reasonable rate of return.[115] The Commission estimated that the fares authorized by Order No. 773 would generate a net operating income of approximately $1.5 million, but Transit's actual net operating income fell short of this calculation by approximately $1.3 million.[116] Similarly, actual net operating income derived during the life of Order No. 1052 was nearly $5.5 million lower than Commission projections.[117]

Transit now argues, in effect, that it should be reimbursed for these income deficiencies. We cannot agree. A fare once set cannot be given retroactive operation by either the Commission or this court.[118] The fares established by Orders Nos. 773 and 1052 were based upon the Commission's best estimates of the amounts of revenue necessary to meet Transit's costs of service and produce a reasonable rate of return for its investors. The simple fact that these estimates were not borne out by experience does not support Transit's argument since, as we held long ago, Transit is not guaranteed a minimum rate

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[115] Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 65-70.

[116] Transit Exhibit 51, J. App. vol. 3 at 125.

[117] Transit Exhibit 53, J. App. vol. 3 at 127.

[118] *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 44, 485 F.2d at 823; *Williams* v. *Washington Metro. Area Transit Comm'n*, *supra* note 51, 134 U.S.App.D.C. at 360-361, 415 F.2d at 940-941.

of return.[119] Transit's investors were required to shoulder the risk that the company's earnings might not support the expected return, just as they enjoyed the right to keep any larger amounts legitimately earned. Any other approach would have forced farepayers to insure Transit's profitability.

Transit's second equitable argument is that it should be permitted to retain the amount of value appreciation attributable to the difference between market value and book value of the identified properties on the date they were acquired.[120] We have already considered and rejected this argument, and Transit gives us no reason to continue the dialogue.[121]

Third, Transit seeks reimbursement for monies paid to the District of Columbia in consequence of Transit's contractual obligation to remove abandoned trolley tracks and repair the streets.[122] At the time of the franchise agreement, PUC estimated the cost of doing so at $10,441,958 and established for that purpose a reserve to be subsidized by Transit at an annual rate of $1,044,196 for ten years.[123] The annual accruals were treated as operating expenses and charged to farepayers through rate in-

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[119] *D.C. Transit Sys., Inc.* v. *Washington Metro. Area Transit Comm'n*, *supra* note 54, 121 U.S.App.D.C. at 387-388, 350 F.2d at 765-766.

[120] Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 70-72.

[121] See Part II(B)(1) *supra*.

[122] Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 72-74. Congress imposed this obligation on Transit in the franchise agreement. Franchise Act, Pub. L. No. 84-757 § 7, 70 Stat. 598, 599 (1956).

[123] See *D.C. Transit Sys., Inc.* v. *Washington Metro. Area Transit Comm'n*, *supra* note 54, 121 U.S.App.D.C. at 389, 350 F.2d at 767.

creases.[124] By December of 1962, accruals to the reserve totaled $6,656,748.22, of which only $1,842,499.10 had been expended by Transit on track removal. At that time, the Commission estimated that track removal planned through mid-1965 would cost an additional $4.1 million,[125] and ruled that, since the reserve was already sufficient to fund the projects anticipated, further additions to the reserve should be suspended indefinitely.[126] We affirmed the Commission's decision.[127]

In January of 1973, in contemplation of Transit's imminent demise as a public utility, the District of Columbia assumed Transit's track removal duties in exchange for a payment by Transit of $3,290,000.[128] This amount exceeded the balance available in the reserve by $3,128,-292,[129] which Transit now claims as an offset against the restitution award. To buttress its position, Transit points out that when we approved the Commission's decision to halt accruals to the reserve for track removal, we observed that "neither the Commission nor we have foreclosed Transit, should it in fact incur expenses for track removal in excess of existing reserves at some time in the

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[124] *D.C. Transit Sys., Inc.* (Order No. 245), 48 Pub. Util. Rep. (PUR) 3d 385, 395 (WMATC 1963), *aff'd, D.C. Transit Sys., Inc.* v. *Washington Metro. Transit Comm'n, supra* note 54.

[125] *D.C. Transit Sys., Inc.* (Order No. 245), *supra* note 124, 48 Pub. Util. Rep. (PUR) 3d at 395.

[126] *Id.* at 397.

[127] *D.C. Transit Sys., Inc.* v. *Washington Metro. Area Transit Comm'n, supra* note 54, 121 U.S.App.D.C. at 388-390, 350 F.2d at 766-768.

[128] Resolution of the District fo Columbia Council, Exhibit C to Affidavit of Harvey M. Spear, *Democratic Cent. Comm.* v. *Washington Metro Area Transit Comm'n*, No. 21,865 (D.C. Cir. filed Aug. 10, 1979).

[129] Affidavit of Harvey M. Spear, *supra* note 128, at 5 n.*.

future, from seeking to recover such expenses from the users of its service." [130] Since Transit had no opportunity to recover the excess of $3,128,292 from farepayers—because it was incurred after its franchise was terminated—it insists that equity calls for reimbursement through the medium of an offset in this amount.

Several factors convince us that Transit is not entitled to an equitable offset on this account. In the first place, we cannot know the extent to which the long delay in removing the trolley tracks caused the expense thereof to rise. From aught that appears, the accumulation in the reserve may have been adequate had the track removal program been carried out expediently; instead, the reserve was constantly and substantially eroded over the years by escalating costs. In the degree that Transit's dalliance increased the expense of track removal, it would be unfair to charge farepayers by reducing the amount of restitution. In addition, we are left in the dark as to the effect of Transit's settlement with the District. Obviously, farepayers should not be saddled with what may have been a poor bargain on Transit's part. And, regardless of whether Transit was made whole for its final track removal outlay by the condemnation award following the takeover of its transportation operation,[131] Transit ac-

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[130] *D.C. Transit Sys., Inc.* v. *Washington Metro. Area Transit Comm'n*, *supra* note 54, 121 U.S.App.D.C. at 390, 350 F.2d at 768.

[131] The parties have expended substantial energy in debating the question whether the Washington Metropolitan Area Transit Authority's award of $44,904,960 reimbursed Transit for this expense. See Brief for Petitioner Democratic Central Committee on Transferred Properties at 21-23; Affidavit of Gilbert Hahn, Jr., *Democratic Cent. Comm.* v. *Washington Metro Area Transit Comm'n*, No. 21,865 (D.C. Cir. filed Sept. 14, 1979); Reply Memorandum of D.C. Transit System, Inc., at 7-9, *reprinted in* Answering Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation, App. 5. As we have indicated, for present purposes this dispute is irrelevant.

cepted the settlement with full knowledge of the fact that there would be no future ratemaking proceeding in which that expense could be recovered from farepayers. For these reasons, we hold that equity does not require a deduction from the amount of restitution to reimburse Transit for track removal.

In its fourth equitable argument, Transit seeks an offset for the $613,661.28 credited by the Commission to the farepayers' fund at the time of the sale of the Fourth Street Shop and the Southern Carhouse.[132] We have already considered this claim and upheld it.[133]

Finally, Transit argues that it should be permitted to recoup from the farepayers any deficiency that existed in its reserve for injuries and damages at the time its franchise was terminated.[134] A Commission-sponsored study conducted in 1971 found that the reserve had a $1.6 million deficit.[135] Transit contended that since it would have been entitled to recover this deficiency from its farepayers through increased fares, but as a result of the takeover lost the opportunity to do so, it should be allowed an equitable offset of the $1.6 million against the amount of the restitution award.

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[132] Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 75-77.

[133] See text *supra* at note 61.

[134] Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 77. Self-insured against claims for injuries and damages, Transit maintained a reserve account on its books to record annual deposits and outlays as needed. Affidavit of Harvey M. Spear, *supra* note 128, at 7.

[135] The report on this study, prepared for the Commission by Main Larentz & Co., and issued on March 27, 1972, was not made a part of the record in this case. Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 77 & n.96.

For much the same reasoning underlying our denial of a recovery for the track-removal expenses, we deny the request for an offset for the deficiency in the reserve for injuries and damages. Since Transit discontinued transportation operations before a new rate order charging the deficiency to farepayers could be considered,[136] we do not know whether the Commission would have adopted the $1.6 milion estimate of the deficiency, or whether the Commission would have ordered a fare increase on this account.[137] Transit's asserted right to this offset is thus entirely speculative, and we refuse to engage in the retroactive ratemaking that its recognition would necessitate.[138] Moreover, the parties disagree, as they did with regard to track-removal expenses, on whether the condemnation award rescued Transit from the reserve deficiency. We reach the same conclusion here that we did before:[139] Transit accepted the condemnation award in the face of a potential deficiency in the reserve, and with full understanding that in all likelihood further recourse against farepayers would be precluded. In these circumstances, we cannot say that the equities preponderate in Transit's favor.

4. *Interest*

BUF and DCC urge us to allow interest on the amount of restitution due the farepayers.[140] Transit concedes that

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[136] Affidavit of Harvey M. Spear, *supra* note 128, at 8.

[137] Counsel for Transit informed us at oral argument that the Commission had indicated that it would allow an offset against the next fare increase for the estimated deficiency, but we have found nothing in the record evidence to this effect.

[138] See text *supra* at note 118.

[139] See text *supra* at note 131.

[140] Brief for Petitioner Black United Front on Properties Issues at 55-65; Brief for Petitioner Democratic Central Committee on Transferred Properties at 26.

interest on the judgment fixing restitution is appropriate, but contends that prejudgment interest would be unjust and improper.[141] Our task is first to determine the date from which interest should run, and then to consider the rate of interest proper.

BUF proposes alternatively three possible sets of "logical dates" from which interest might accrue: the dates upon which the appreciated properties were respectively removed from operation, the dates of improper fare increases, and the date of our decisions in *DCC I* and *DCC II*.[142] Transit contends that interest cannot begin to run until we have determined the precise amount of restitution to be allowed.[143] Since that amount was not fixed in our prior decisions [144]—and is not computed today—Transit says that the obligation to pay interest has not yet matured.

We faced a similar question of entitlement to interest in *Bebchick III*.[145] There we decided that

> the fair and appropriate date from which to accrue interest [is] . . . the day on which *Bebchick II* was decided. In that decision the court decided for the first time that Transit had earned excess monies on

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[141] Answering Brief for D.C. Transit System, Inc., on Properties Market Value Appreciation at 32-40.

[142] Brief for Petitioner Black United Front on Properties Issues at 56. Although DCC does not discuss the issue of interest at length, it suggests that interest be calculated from the date each property was transferred out of service. See Brief for Petitioner Democratic Central Committee on Transferred Properties at 14, 18.

[143] Answering Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 35-37.

[144] Answering Brief for Petitioners D.C. Transit System, Inc., on Properties Market Value Appreciation at 37.

[145] *Bebchick III*, *supra* note 8, 207 U.S.App.D.C. at 168, 645 F.2d at 1093.

> prior fares which should be paid into the riders' fund—overturning a contrary Commission ruling.[146]

Similarly our *DCC* decisions marked the turning point in the litigation now before us, for we there held for the first time that appreciation in the value of operating properties accruing while they were dedicated to the public service rightfully belonged to farepayers. Although the discussions in those cases did not reach the precise amount of restitution, they did set the maximum to which farepayers would be entitled.[147] Consequently, we hold that interest on the amount of restitution ultimately awarded in this case should run from June 28, 1973, the date of our decisions in *DCC I* and *DCC II*. Interest from that date is fully in order because of the substantial depletion in the value of money wrought by inflation, and the need to forestall unjust enrichment of Transit and to assist the effort to make the farepayers as whole as possible. Since, however, Transit did not know prior to issuance of these decisions that the fares authorized in Orders Nos. 773 and 1052 were improper, we decline to hold it responsible for interest before that date.

We must next determine the rate at which interest should be set, and find that the parties have provided little help on this issue. BUF suggests that we use the Consumer Price Index in order to "give [the farepayers] back today the economic equivalent of what was unlawfully taken from them." [148] DCC urges us to employ "such rate as [we] deem appropriate under the criteria . . .

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[146] *Id.* (citations omitted).

[147] The amount of restitution could not exceed the total of excess fares collected as a result of the two illegal fare orders involved. See *DCC I*, *supra* note 2, 158 U.S.App.D.C. at 46-47, 485 F.2d at 825-826.

[148] Brief for Petitioner Black United Front on Properties Issues at 62.

announced in *Bebchick III*." [149] Transit concentrates solely upon its denial of liability for prejudgment interest and fails to recommend any appropriate rate.[150]

In *Bebchick III*, we adopted an interest rate of 7.1 percent for the period from June 28, 1973, to December 19, 1974.[151] This rate, proposed in that proceeding by the Bebchick group, was based upon the Consumer Price Index and the prime rate of a local bank,[152] and we believe that it would be fair and equitable to use that rate in this proceeding as well. December 19, 1974, was the date on which monies now to be used for the farepayers' restitution were deposited in a bank account under judicial control,[153] and in *Bebchick III* we ruled that interest from that date onward should be allowed at the 7.1 percent rate earned by the monies in that account.[154] Although no deposit arrangement was made in the *DCC* cases, we think the rate of interest allowed the *Bebchick* group would be appropriate in the case at bar. We are guided in this connection by the American Law Institute's suggestion that "a person owing restitution in money should make restitution as if he had invested the sum so owed." [155] The money in the court-held account is invested conservatively at minimum risk, and we are convinced that the rate may appropriately be adopted here.

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[149] Brief for Petitioner Democratic Central Committee on Transferred Properties at 26.

[150] See Answering Brief for Petitioner D.C. Transit System, Inc., on Properties Market Value Appreciation at 32-40.

[151] *Bebchick III*, *supra* note 8, 207 U.S.App.D.C. at 168, 645 F.2d at 1093.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 168-169, 645 F.2d at 1093-1094.

[155] Restatement (Second) of Restitution § 28 comment a (Tent. Draft 1983).

On remand, the Commission must calculate prejudgment interest accordingly.

III. Costs and Fees

We must now determine who must bear the expenses incurred by the Commission in connection with the remand proceedings already conducted. As we discussed in *Bebchick III*, the Commission initially assessed against Transit the costs in the *Bebchick* and *DCC* disputes, and collected in advance approximately $200,000 from Transit to cover the Commission's expenses on remand.[156] Upon completion of those proceedings, however, the Commission concluded that Transit should bear none of the costs of the remand, and ruled that Transit was entitled to recover not only the $200,000 previously collected from it for expenses of the Commission but also all of Transit's own expenses.[157] The Commission felt that the remand proceedings were essentially continuations of the prior ratemaking proceedings, the costs of which farepayers are generally required to bear, and that the expenses on remand should be levied against the farepayers' award of restitution.[158]

In *Bebchick III*, we upheld the initial assessment of the Commission's costs against Transit, but reversed the decision contemplating reimbursement by farepayers for Transit's own costs.[159] We noted that while the Compact permitted the costs of ratemaking to be borne by farepayers, it also provided that "[a]ll reasonable expenses of any investigation, or other proceeding of any nature,

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[156] See *Bebchick III*, *supra* note 8, 207 U.S.App.D.C. at 169, 645 F.2d at 1094.

[157] Commission's Property Report, *supra* note 27, at 29-30, J. App. vol. 1.

[158] *Id.*, J. App. vol. 1.

[159] *Bebchick III*, *supra* note 8, 207 U.S.App.D.C. at 169, 645 F.2d at 1094.

conducted by the Commission, of or concerning any carrier, and all expenses of any litigation, including appeals, arising [therefrom] shall be borne by such carrier." [160] Because the remand in *Bebchick III* placed the Commission in a role not envisioned by the Compact—that of special master for the court, not ratemaker—the question of cost allocation was "not one of the Commission's authority but of the court's own judgment." [161] Accordingly, we concluded that the Bebchick group should not bear the expenses of either Transit or the Commission.

An examination of the variant circumstances surrounding the remand in the *DCC* cases, however, leads us to depart from our holding in *Bebchick III* with respect to the Commission's own costs. In *Bebchick III*, we were influenced by the fact that "the remand was largely unnecessary. Transit rejected figures which it later accepted on the remand, and . . . part of the Commission's activities did not require any further hearings at all." [162] Here, on the contrary, the immense value of the remand proceedings has been fully proven. The Commission, compliably with our instructions in the *DCC* decisions, hired experts, compiled testimony and exhibits, commissioned studies, analyzed the massive record data and reported meaningfully its findings and conclusions to us. From this heavy investment of Commission time and labor, the farepayers and the court alike have benefited greatly. In keeping with the rationale of *Bebchick III*, we hold that the Commission's costs on the last-conducted remand in these cases are to be paid from the fund for restitution.

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[160] Washington Metropolitan Area Transit Regulation Compact, tit. II. art. XII, § 19(a), incorporated into Pub. L. No. 86-794, 74 Stat. 1031, 1047 (1960); *Bebchick III*, *supra* note 8, 207 U.S.App.D.C. at 169, 645 F.2d at 1094.

[161] *Bebchick III*, *supra* note 8, 207 U.S.App.D.C. at 169, 645 F.2d at 1094.

[162] *Id.*

The exact amount of these costs will have to be calculated by the Commission, as the data before us[163] do not demarcate the expenses in the *DCC* remands from those incurred in the remand from *Bebchick II*.

As to Transit's costs, however, we cannot accept the Commission's conclusion that they too should be paid out of the fund for restitution. Each participant before the Commission has sought to serve its own discrete interests, and we think it equitable to require each to pay its own way. Fairness thus dictates that each should bear its own expenses in connection with the remand.[164]

Finally, we reach an issue of attorneys' fees. Prior to oral argument, we requested fee applications from petitioners,[165] then assuming that today's decision would mark the resolution of all controversies remaining. As still another remand to the Commission is necessary, we deem it best to defer consideration of awards of attorneys' fees until ultimate disposition of these cases by this court. We will request supplemental fee applications at the appropriate time, and we do not ask the Commission to tackle the question of attorneys' fees on remand.

IV. Conclusion

It is with much regret that once more we must remand to the Commission. We are, of course, fully aware of the duration of this litigation, but we lack the data needed for computation of the precise amount of restitution to be awarded to farepayers.

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[163] A list of payments made from the fund appears in a letter from William H. McGilvery to Harvey M. Spear (Aug. 14, 1978), *reprinted in* J. App. vol. 5 at 234-236.

[164] Cf. *Bebchick III*, *supra* note 8, 207 U.S.App.D.C. at 169, 645 F.2d at 1094.

[165] *Democratic Cent. Comm.* v. *Washington Metro. Area Transit Comm'n*, No. 21,865 (D.C. Cir. Dec. 10, 1984) (order).

In an effort to minimize confusion and expedite the remand proceedings, we summarize the Commission's remaining tasks. First, in calculating the gain through value appreciation on the Fourth Street Shop and the Southern Carhouse, the actual 1959 selling price must be substituted for the appraiser's estimate.[166] No deduction for a brokerage fee may be allowed,[167] and these properties are to be treated like all others involved for the purpose of estimating capital gains taxes.[168] Second, the capital gains taxes on all properties must be recalculated by resort to the methodology approved in *Bebchick III*.[169] Third, the Commission must ensure that the total amount of restitution does not exceed the total of the fare excesses purportedly authorized by the orders under review in these cases.[170] Fourth, the Commission must reduce the net gain on the Fourth Street Shop and Southern Carhouse by $613,661.28 to compensate for profits already allocated to farepayers,[171] and must subtract $283,869 for cost-of-living expenditures from the total amount of restitution.[172] The Commission must then calculate interest from June 28, 1973, at the rate we have prescribed.[173] Finally, the Commission's expenses on the prior *DCC* remands, as well as those on the remand we order today, must be subtracted from the restitution award.[174]

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[166] See Part II(B)(2) *supra*.

[167] See text *supra* at notes 79-80.

[168] See text *supra* at notes 81-82.

[169] See Part II(B)(4) *supra*.

[170] See Part II(C)(1) *supra*.

[171] See text *supra* at note 61.

[172] See Part II(C)(2) *supra*. Deduction of these amounts prior to calculation of interest on the amount of restitution renders calculation of interest on the amounts subtracted unncessary.

[173] See Part II(C)(4) *supra*.

[174] See Part III *supra*. The expenses of today's remand should initially be assessed against Transit if an interim

When the remand proceedings are completed, the Commission will report the results to this court. At that time, the court will entertain any objections to the proceedings on remand, suggestions for distribution of the restitutionary fund, and applications for attorneys' fees.

So ordered.

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assessment is required. Later deduction of the Commission's expenses from the amount of restitution will reimburse Transit.

Panel Dissent

MACKINNON, *Senior Circuit Judge* (dissenting in part and concurring in part). My dissent in this case is compelled by my conclusion that the majority, under the guise of restitution, has exceeded its jurisdiction and engaged in prohibited retroactive ratemaking in stretching a valid restitutionary award of $738,720 with respect to one invalid rate order, into an award of $2,605,588 that is based upon the alleged invalidity of several valid rate orders whose validity was never attacked by an action. Interest to run on both awards for approximately fifteen years. In my opinion restitutionary awards must be based only on particular rate orders that courts with jurisdiction have declared to be unjust and unreasonable.

I thus dissent to much of Part II of the majority opinion, entitled "Property Issues." In this Part, the court treats (1) the Commission's identification of properties converted from operating to non-operating status, (2) the Commission's computation of the amount of value appreciation of such properties, and (3) the extent to which that amount should be shared by farepayers. My inability to join in this Part of the court's opinion is based on my conclusion that its calculation of the amount of restitution is largely in conflict with established law. My disagreement springs from two principal sources. First, it is my opinion that the court's *method* of calculating restitution is fundamentally flawed. Second, the *period of time* during which the invalid fares are deemed to have been in effect for the purpose of awarding restitution is in contradiction of the stautory procedures required to invalidate ordered fares and is incorrect. These two objections are treated in turn. Finally, there is a third area in which I differ from the proposed disposition by the majority: the denial of four of five claims made by Transit for equitable adjustment in the amount of restitution to be awarded.

I concur in Parts I and III of the majority opinion dealing, respectively, with the efficiency and viability of D.C. Transit System, Inc. ("Transit") and the awarding of fees and costs, which correctly state the governing law. Part I affirms the finding of the Washington Metropolitan Area Transit Commission ("Commission") that Transit was sufficiently viable and efficient in 1970 to be entitled to the benefit of a fare increase.[1] In Part III, the court upholds reimbursement of the Commission for its expenses in connection with our remand, holds that all other parties must bear their own costs, and defers consideration of petitioners' applications for attorneys' fees.

I. Method of Calculating Restitution—Allocation of Gain

It is my conclusion that the majority incorrectly allocates to farepayers the gain on *nondepreciable* assets

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[1] The majority opinion arrives somewhat late at this correct assessment of the efficiency and viability of Transit. *See* Democratic Central Comm. v. Washington Metro. Area Transit Comm'n ("DCC II"), 485 F.2d 886, 915 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part), *cert. denied*, 415 U.S. 935 (1974) (arguing "past management was perhaps not as inefficient as has been contended . . . ."). On remand, the Commission, supported by independent expert study, came to the same conclusion. *See* "Report of the Commission on the Issues of 'Efficiency' and 'Viability,'" *In re: Remands from the United States Court of Appeals for the District of Columbia of D.C. Transit System, Inc.* (Aug. 31, 1981) at 9-13, 40 (upholding Hearing Officer's 448-page report finding that Transit was efficient and viable in 1970); "A Financial Analysis of D.C. Transit System, Inc. (District of Columbia) and Subsidiaries as of April 15, 1970," *reprinted in* Appendix to Brief for Petitioner Black United Front on Viability and Efficiency Issues ("Laconto Report").

The majority's validation of the Commission's finding of efficiency and viability mandates that, insofar as that issue is involved, the fare increases approved by Order 1052 were fair and reasonable, and are not subject to inclusion in the restitutionary calculation. *See infra* note 12.

when transferred out of service. Such allocation contravenes: the express statutory language of the Washington Metropolitan Area Transit Regulation Compact (the "*Compact*"),[2] which provided for Transit's franchise to operate a mass transportation system in the metropolitan area; relevant case law of this and other courts; and traditional principles of public utility regulation. The decision of the majority ignores the principles that: a) depreciable and nondepreciable assets are to be treated differently; and b) investors are entitled to recover a fair rate of return on their risk-incurring investment.

In rejecting the argument that ratepayers were not entitled to share in any portion of the proceeds of the sale of corporate assets unless there was a profit on the *depreciable* portion of the assets sold, the majority fails to recognize that the Compact itself provided that investors, having undertaken a risk of loss, would be entitled to recover a return on their investment, to-wit:

> It is hereby declared as a matter of legislative policy that in order to assure the Metropolitan District of an adequate transportation system operating as private enterprises the carriers therein, in accordance with standards and rules prescribed by the Commission, should be afforded the opportunity of earning such return as to make the carriers attractive investments to private investors. As an incident thereto, the opportunity to earn a return of at least 6½ per centum net after all taxes properly chargeable to transportation operations, including but not limited to income taxes, on gross operating revenues, shall not be considered unreasonable.

Compact, at 1040-41. This declaration adopted, nearly verbatim, the language used by Congress in 1956 in the Act granting Transit a franchise to operate a mass

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[2] Washington Metropolitan Area Transit Regulation Compact ("*Compact*"), tit. II, art. XII, § 6(a)(3), *incorporated into* Pub. L. No. 86-794, 74 Stat. 1031 (1960).

transportation system in the Washington metropolitan area. *Public Law 757, ch. 669, 70 Stat. 598-99, 49 U.S.C. 27 et seq. (84 Cong., 2d Sess., July 24, 1956)* (*"Franchise Act"*). The Franchise Act contained the additional policy declaration that "Congress will maintain a continuing interest in the welfare of the Corporation and its investors." 70 Stat. at 599.

In fact, one of the cases cited earlier in this litigation, *City of Lexington v. Lexington Water Co.*, 458 S.W.2d 778 (Ky. 1970),[3] explicitly rejected any crediting of profits to consumers and held such profits belonged to shareholders. In that decision, the Kentucky Supreme Court held that the risk of capital gain or loss fell on investors' shoulders, and, in a precise holding, concluded that:

> [p]rofit made from the sale of *non-depreciable land* no longer used in serving customers is not an ingredient to be considered in fixing rates. The customers had no interest in the profit realized on the sale—it belonged to the stockholder.

Id. at 780 (emphasis added). This ruling in *Lexington Water Co.*, as we noted in *Democratic Central Committee v. Washington Metro. Area Transit Comm'n* (*"DCC I"*), 485 F.2d 786, 797 n.82 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974), explicitly relied on the United States Supreme Court's emphatic declaration on the risk allocation issue in *Board of Pub. Util. Comm'rs v. New York Telephone Co.*, 271 U.S. 23 (1926):

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable,

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[3] Cited in Democratic Central Committee v. Washington Metro. Area Transit Comm'n (*"DCC I"*), 485 F.2d 786, 796-97 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

> in the property used for their convenience or in the funds of the company.

Id. at 32.

New York Telephone has been consistently adhered to. To the same effect is *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (review of rate orders necessarily requires a "balancing of the investor and the consumer interests"). A few years later, in *Washington Gas Light Co. v. Baker*, 188 F.2d 11 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951), this court articulated a "zone of reasonableness within which rates may properly fall . . . bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates." *Id.* at 15.[4] Recently, this court followed these precedents closely in mandating a "reasonable balancing" of investor and consumer interests in a utility rate dispute. *Jersey Central Power & Light Co. v. Fed. Energy Reg. Comm'n*, 810 F.2d 1168 (D.C. Cir. 1987). The present decision thus appears to represent an abrupt *volte-face*, abandoning the principle that allocation of gain on *non*depreciable assets will *not* depend on whether consumer or investor bears the risk. Investors *necessarily* bear that burden.

It has long been standard practice in utility cases to allocate gain or loss on nondepreciable assets to investors, rather than to consumers, since the concept of obsolescence applies only to depreciable property, not to land.[5] Customers have no interest in profits on dispositions of land, since they make no contribution to capital cost and have therefore not reimbursed investors for their capital

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[4] *See also DCC I*, 485 F.2d at 831 (MacKinnon, J., concurring in part and dissenting in part).

[5] *See DCC I*, 485 U.S. at 834-37 (MacKinnon, J., concurring in part and dissenting in part); *see also Re D.C. Transit System, Inc.* (Order No. 245), 48 P.U.R. 3d 385, 399-400 (Wash. Metro. Area Transit Comm'n 1963).

outlay. Hence, such dispositions are only a concern for investors, and are not an ingredient in ratemaking.[6]

Moreover, as this court conceded in *DCC I*, the "uniform result" of administrative decisions within the District of Columbia has been to allocate gain on disposition of nondepreciable assets to investors. 485 F.2d at 795. Hence, the present majority not only flouts traditional accounting methods,[7] but also rejects the unanimous decisions of expert regulatory agencies that have specifically relied on the Supreme Court's decision in *New York Telephone*. The majority opinion thus blazes its own trail, a trail unlikely to be followed by courts more attentive to the principle that reasonable and rational administrative agency decisions will not be overturned simply because a majority of the division feels that equity would be better served by a different disposition, or that they

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[6] The principle of legitimate investor interest in a fair rate of return on investment is also well-established in the scholarly literature. *See e.g.*, Bonbright, *Principles of Public Utility Rates* (1961); E. Gellhorn & R. Pierce, *Regulated Industries in a Nutshell* 134-44 (1987); E. Nichols, *Ruling Principles of Utility Regulation: Rate of Return* 47-48 (1955).

[7] Quite apart from the depreciable/nondepreciable distinction, it should be noted that the Opinion's preference for the "book-to-market" method of calculating gain allocable to farepayers (Opinion, at 14-15), as opposed to the "market-to-market" method (which would require subtraction of market value on date of first operation from market value at time of transfer), is open to question. Although I feel constrained to concede that (as the majority notes) our instructions to the Commission in *DCC I*, 485 F.2d at 827, and *DCC II*, 485 F.2d at 914, effectively directed calculation according to the former method, further reflection indicates that the latter method may better accord with investors' entitlement to the benefit of their bargain and also provide a better approximation of real value, since book value is usually a poor indicator of an item's worth. *See generally* G. Johnson & J. Gentry, *Finney's Principles of Accounting*, 367, 372 (8th ed. 1980).

themselves would have reached a different conclusion.[8] Under well-established precedents, courts must determine only whether the administrative action was so improper as to fall outside a broad "zone of reasonableness"—so unreasonable as to constitute an abuse of discretion.[9] Here, the Commission made a reasonable allocation with respect to nondepreciable assets, and therefore there is no legal basis upon which to overturn it.

Assuming, arguendo, that gain realized on nondepreciable assets *should* accrue to farepayers, it would still constitute error to order that the invalidity of Order 773 continued beyond the termination date of that order. Rising costs of operation, inflationary pressures, and other socio-economic forces too complex to quantify would have combined to make the fare hikes represented by the post-773 rate orders necessary, inevitable and valid. Indeed, the Commission's findings accompanying the promulgation of each new rate reflect this fact. Any small difference in Transit's operating capital resulting from depriving investors of their gain on land would not likely have resulted in the lower fares that the majority seems to assume would have resulted. If these economic realities were not the case, it is difficult to understand why no farepayer contested the increases in rates fixed by the orders which followed Order 773. In this connection, it should be noted that the holding of the majority on the land value appreciation issue constitutes an attack on Orders 773 and 1052 that was never made against the intervening fare orders. *See infra* Part II.B.

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[8] *See DCC I*, 485 F.2d at 833, 845-47 (MacKinnon, J., concurring in part and dissenting in part); *see also* Southern Natural Gas Co. v. Fed. Energy Reg. Comm'n, 813 F.2d 364, 369 (11th Cir. 1987).

[9] *See, e.g.*, In re Permian Basin Area Rate Cases, 390 U.S. 747, 767, 791 (1968); Public Serv. Comm'n v. Econ. Reg. Admin., 777 F.2d 31, 36 n.6 (D.C. Cir. 1985).

II. The Period for Calculating Restitution

The second—and even more important—area in which, in my opinion, the majority errs, is in its determination of the *period* that should be covered by the restitutionary award, i.e., artificial extension of Order 773 beyond its effective period. The majority correctly begins the restitution period with the complete period that Order 773 (invalidated in *DCC I*) fixed D.C. fares; but then continues that period without interruption far beyond the date that Order 773 was terminated by superseding orders. In this respect, the majority rules that the fare fixed by Order 773 on January 26, 1968 continued, *for the purpose of awarding restitution for the next seven years*—until January 14, 1973 when Transit was taken over by eminent domain. The effect of such decision is to decide retroactively—some fourteen years after the last fare order—that three successive fare orders issued after Order 773 were invalid, even though a fourth order, Order 1052, was the only one of the superseding fare orders that was challenged by farepayers. This treatment, which assumes the continuing invalidity of the fare increase authorized by Order 773, is erroneous on several grounds. Before demonstrating the soundness of this point and the error of continuing the invalidity beyond the effective date of the order, it is desirable to outline briefly the ratemaking background being dealt with.

A. *Background of Rate Orders*

Prior to January 26, 1968, basic rates for mass transportation in the District of Columbia had been set at a cash fare of 25 cents and a token fare of four for 98 cents. Transit applied to increase these fares to 30 cents each and four tokens for $1.10. In Order 773, issued January 26, 1968, the Commission rejected this request, but allowed a 2 cent increase, to 27 cents cash fare and four tokens for $1.00.[10] In *Powell v. WMATC*, 485 F.2d

[10] 72 P.U.R. 3d 113, 158 (WMATC 1968).

1080 (D.C. Cir. 1973), this court substantially affirmed the Order.

However, in *DCC I*, decided the same day as *Powell* (June 28, 1973), we reviewed a different aspect of Order 773. In *DCC I*, the court held that, in promulgating Order 773, the Commission erred in refusing to allocate to farepayers, as an offset to higher fares, the appreciation in value (the excess of market value over book value) of properties when transferred from operating to non-operating status. We declared Order 773 invalid to that extent, and ordered restitution, in an amount to be determined by the Commission on remand.

Prior to the issuance, in 1973, of our decision in *DCC I*, however, a number of *other* superseding rate orders had been promulgated by the Commission. On October 18, 1968, the Commission issued Order No. 882 (unreported), setting rates at 30 cents/cash fare, 26¼ cents/token fare (min. purchase of 4). No court challenge was brought against this Order.

On Dec. 23, 1968, the Commission issued Order No. 900 (unreported), setting rates at 30 cents cash fare and 30 cents token fare (minimum purchase of 4). No court challenge was brought against this Order either.

On October 24, 1969, the Commission issued Order No. 984,[11] rejecting Transit's requested rates of 32 cents cash fare, 32 cents token fare as excessive, but declaring Transit entitled to a fare increase nonetheless, with fares to be set at a "just and reasonable level." No farepayers challenged this Order. *Transit*, however, petitioned for review. In *DC Transit System Inc. v. WMATC*, 485 F.2d 881 (D.C. Cir. 1973), we held that the Commission had not given proper consideration to the higher labor costs, attributable to increases in the cost of living, which Transit faced. We held Transit entitled to fare increases

[11] 81 P.U.R. 3d 417 (WMATC 1969).

to the extent such heightened costs made increases necessary, and remanded to the Commission for computation.

Finally, on June 26, 1970, the Commission issued Order No. 1052 (83 P.U.R. 3d 1), authorizing Transit to increase its fares to: 40 cents/cash fare, 40 cents/token fare (minimum purchase: four tokens). Farepayers did challenge this Order and, in *Democratic Central Comm. v. Washington Metro Area Transit Comm'n* ("*DCC II*"), 485 F.2d 886 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974), we set aside the Order on the ground that the Commission had failed to take into account both the increase in the value of Transit's land and Transit's alleged ineficiency. Nevertheless, by June 28, 1973 when our decision in *DCC II* was rendered, a public authority had already acquired Transit by eminent domain. We therefore remanded to the Commission for computation of the restitution award.

It is only with an understanding of this protracted history that we may compute the restitution due farepayers. In light of the foregoing progression of rate orders, the amount of restitution that should be awarded as compensation should be limited to the excessive fares exacted during the period that Order 773 was in effect, and *not*—as the majority holds—for fares exacted during periods in which other superseding fare orders, duly promulgated by the Commission, and prima facie valid and never challenged by farepayers, were in operation.[12]

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[12] It should be emphasized that (subject to the validity of my objection to the majority's decision with respect to the allocation of gain on land) no part of this Court's restitutionary award in this case should be construed to compensate farepayers for overcharges allegedly imposed by Order *1052*. This follows from the majority's conclusion (Opinion, at 2-6) that, on remand, the Commission correctly found Transit to be efficient and viable in 1970 and thus recognized the valid basis for Order 1052 that the court had found lacking in *DCC II*, 485 F.2d at 913. As the Opinion notes:

An examination of the law on retroactive ratemaking demonstrates the particular defects of the computation by the majority.

B. *Reasonable Rates and the Prohibition of Retroactive Ratemaking*

Part II.C.1. of the majority's opinion (entitled "Amount of Restitution Available in *DCC I*")[13] rejects Transit's argument that restitution be limited to $738,720, the aggregate of overcharges collected during the 277 days in which the fare hike allowed by Order 773 was in effect before it was invalidated by *DCC I*. Despite the fact that Order 773 was superseded by several subsequent fare orders which either were never challenged by any farepayer (Orders 882, 900, and 984) or were authorized by the Commission despite farepayer challenge (Order 1052), the majority adopts the Commission's recommended restitutionary award of $2,605,588. This sum represents "the fare increment authorized by Order No. 773 over the remainder of Transit's life as a public utility"[14] as though the subsequent unchallenged orders were automatically invalid. And whatever amount is awarded as restitution it would be increased by high interest computed from 1973—15 years—a stupendous sum.

The majority argues that Order 773 served as a "base fare"[15] as to which all subsequent rate orders were "in-

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> The Commission thus has cured its neglect of Transit's efficiency and viability when it promulgated Order No. 1052 by investigating and determining those matters on remand. It follows that Transit's farepayers are *not* entitled to any restitution on the now-refuted theory of a lack of efficiency or viability on Transit's part in 1970.

Opinion, at 5-6 (emphasis added).

[13] *Id.* at 23-24.

[14] *Id.* at 24.

[15] *Id.* at 23.

cremental." [16] There is a strong body of statutory and decisional authority arguing against the retroactive ratemaking which the majority's opinion would create. Neither statutory or decisional law countenances backward-looking revision of new, effective rates based on a prior judicial invalidation of an earlier rate—retroactive ratemaking. The majority argues that its conclusion "does not disturb any authorization of an additional fare increase following Order No. 773, and thus raises no issue of preclusion or due process . . . ." [17] However, that is exactly what the automatic application of the invalidity of Order 773 to all subsequent unchallenged fare orders, for restitution purposes, does do.

Both statutes and case law provide considerable authority against the "base fare/rate increment" approach which the majority, flouting due process, takes here.

1. *Statutes*

There are three statutory schemes relevant here, each of which are violated by the majority: (a) D.C. Code Title 43 (the public utility law for the District of Columbia); (b) D.C. Code Title 12 (the relevant statute of limitations); and (c) Public Law 757, Ch. 669, 70 Stat. 598, 49 U.S.C. 27 et seq. (July 24, 1956) (granting a franchise to D.C. Transit System, Inc.).

(a) *D.C. Code Title 43.*

Several provisions of the District of Columbia Code direct *prospective* ratemaking.

i) D.C. Code § 43-702 (1967) provided:

> All public utilities to which an order of the Commission applies shall make such changes in their sched-

[16] *Id.* at 23 n.105 (*quoting* Report of the Hearing Officer, In re Remands from the United States Court of Appeals for the District of Columbia Circuit of D.C. Transit Sys., Inc. (Feb. 17, 1978), at 26).

[17] *Id.* at 24.

> ules on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any public utility in any such rates, tolls, or charges, or in any joint rate or rates, without the approval of the commission. Certified copies of all other orders of the commission shall be delivered to the public utility affected thereby in like manner, and the same shall take effect within such reasonable time *thereafter* as the commission shall prescribe.

(Codified at D.C. Code § 43-901 (1981) (emphasis added)).

ii) D.C. Code § 43-702 (1967) provided:

> *The commission may*, at any time, upon notice to the public utility and after opportunity to be heard as provided in section 43-410 [now § 43-610], *rescind, alter, or amend any order fixing any rate* or rates, tolls, charges or schedules, or any other order made by the commission, and certified copies of the same shall be served and *take effect as herein provided for original orders.*

(Codified at D.C. Code § 43-902 (1981) (emphasis added)).

iii) D.C. Code § 43-703 (1967) provided:

> *All rates*, tolls, charges, time and condition of payment thereof, schedules, and joint rates fixed by the commission *shall be in force and shall be prima facie reasonable until finally found otherwise in an action brought for that purpose.*

(Codified at D.C. Code § 43-903 (1981) (emphasis added)).

This required that an "action [be] brought" to set aside fare orders. Declaring a "rate" invalid without such action is a plain denial of due process.

(b) *D.C. Code Title 12 (Limitation of Actions).*

In the absence of a more specific statute of limitations, the catch-all provision of the D.C. Code requires that any attack on a rate must be brought within three years. D.C. Code § 12-301 (1981) provides:

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues. . . .
>
> . . . (8) for which a violation is not otherwise specifically prescribed—three years. . . .

(c) *Public Law 757, Ch. 669, 70 Stat. 598, 49 U.S.C. 27 et seq. (84th Cong., 2d Sess., July 24, 1956) ("Franchise Act").*

This Act provides:

> The initial schedule of rates . . . shall continue in effect until August 15, 1957, and thereafter until superseded . . . . Whenever on or after August 15, 1957, the Corporation files with the Commission a new schedule of rates, such new schedule shall become effective on the tenth day *after* the date of such filing, unless the Commission suspends the operation of such new schedule . . . . If the Commission suspends such new schedule it shall immediately give notice of a hearing . . . and, *after* such hearing . . . shall determine and by order fix the schedule of rates to be charged by the Corporation. If the Commission does not enter an order, to take effect at or prior to the end of the period of suspension . . . the suspended schedule filed by the Corporation may be put into effect by the end of such period, and shall remain in effect until the Commission has issued an appropriate order based on such proceeding.

70 Stat. at 599 (emphasis added). Hence, under the Congressional Act which granted Transit its franchise to operate a mass transportation system in the Washington metropolitan area, fares are presumed to be reasonable upon their effective date, and supersede earlier fares. Moreover, the Compact itself states that, with respect to judicial review of fare orders, "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." *Compact*, 74 Stat. at 1046.

Taken together, these provisions evidence legislative intent to permit only prospective ratemaking, and to *bar retroactive ratemaking*. They offer a clear statutory direction that rate increases become effective "after" issuance of the Commission orders authorizing them. The majority's approach would doom the Commission to an unceasing game of catch-up—especially difficult in periods of heavy inflation such as the period in which this litigation arose—in its attempt to achieve a proper rate based on both consumer needs *and* its own costs. The statute of limitations provision, moreover, compels the conclusion that, since the rate orders issued between Order 773 and Order 1052 were never challenged "in an action" (*see* D.C. Code § 43-703) by farepayers during the prescribed three year period, each of those orders must be deemed valid for the entire period during which they were in effect. The operation of none of these orders was ever *suspended* and hence under the statute continued to be "effective" until superseded by a subsequent order.

2. *Decisional law*

There is a substantial body of decisional law affirming the presumptive validity of duly adopted rate orders and barring retroactive revision of such orders. Several courts have dealt with superseding rate orders, and courts have refused to return to the first in a series of rate orders and treat it—as the majority does here—as an ongoing base rate upon which all subsequent rates were built. Each order is based on a separate showing and determination as to reasonableness, and hence must be evaluated individually.

Board of Public Utilities Comm'rs v. New York Tel. Co., 271 U.S. 23 (1926) furnishes a good example. In that case, the Supreme Court upheld a temporary injunction restraining the enforcement of telephone rates since the utility *"could not be compelled to make up deficits in future net earnings out of the depreciation reserves ac-*

cumulated in the past." [18] The Court, in barring retroactive ratemaking such as the majority sanctions here, went on to stress that "the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. *Profits of the past cannot be used to sustain confiscatory rates for the future.*" [19]

Twenty years later, in *United States v. Public Utilities Comm'n*, 158 F.2d 533 (D.C. Cir. 1946), *cert. denied*, 331 U.S. 816 (1947), this court faced the issue of the presumptive validity of superseding rate orders even more directly than the Supreme Court had in *New York Telephone*. *Public Utilities Comm'n* upheld a rate order against a Government petition which asserted that the rate invalidly permitted some $29 million in excess profits collected under a *prior rate* to remain as an element in the rate base. The court expressly refused to undertake the backward-looking review that the majority undertakes here, observing:

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[18] 271 U.S. at 28 (emphasis added).

[19] *Id.* at 32 (emphasis added); *see also* Federal Power Comm'n v. Colorado Gas Co., 348 U.S. 492, 501 (1975) ("it is not the function of a court itself to engage in ratemaking"); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602, 618 (1944) ("He who would upset the [FPC] rate order under the [Natural Gas] Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. . . ."; at the same time, *the Commission had no power to make reparation orders or to fix past rates*); Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942) (constitutional challenge to Natural Gas Act; "regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned."); *cf.* United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966); (res judicata bar to reopening settled matters).

> [T]his court would be undertaking a wrongful invasion of the regulatory territory properly reserved for the Public Utilities Commission if we were to say . . . that a high return on the common stock equity is, in and of itself, ample reason for retrospectively holding invalid rate schedules authorized by the Commission over a course of many years. It is only by saying retroactively that the rates extracted in former years were not "just and reasonable", that we can conclude that the surplus of undistributed earnings was an unlawful accumulation which could not be devoted to the public service in such a fashion as to warrant allowing the Company to earn a return on it.

Id. at 535. The court also held that even if the Company had been less vigilant than it might have been in protecting consumer interests, superseding rate orders, if "just and reasonable" within a broad ambit of discretion, would not be disturbed by a reviewing body. *Id.* at 536. "High profits and just rates," wrote the court, "are not prima facie incompatible." *Id.* The court went on to examine a pattern of ratemaking and order-by-order proceeding strikingly similar to the pattern evidenced by the rate orders of the Commission in this case, and concluded:

> [T]hroughout the many years during which the sliding scale arrangement has been in effect, the rates have been *excessive and illegal. Each year, however, the rates were fixed by an order of the Commission. . . . The annual orders which fixed the rates became firm and conclusive when no person affected thereby availed himself of the right of appeal.* Consequently the rates so fixed became the legal rates for the periods during which they were to endure, and neither the United States nor any other party affected thereby can brand them as illegal.

United States v. Public Utilities Comm'n, 158 F.2d at 537-38 (emphasis added). This earlier decision of our court applies here. It has never been overruled or criti-

cized, and squarely contravenes the restitutionary approach of the majority.[20]

Even more importantly, in *Williams v. Washington Metro. Area Transit Comm'n*, 415 F.2d 922 (D.C. Cir. 1968), this court applied the principles developed in the aforementioned cases to the specific Commission involved in the present dispute. In a lengthy opinion, this court invalidated two Commission orders, Order No. 245 and Order No. 563. However, noting that those orders had been superseded by subsequent Commission rate orders, the court declined to remand for further consideration. *Id.* at 939-41. The decision states:

> The propriety of another remand thus hangs on the Commission's power to devise a new order, *nunc pro tunc*, governing the years intervening between Order No. 245 and the entry of a subsequent order prescribing the "lawful fare . . . to be in effect." The Commission, however, possesses no authority to fix rates for the past. An order prescribing the lawful fares

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[20] *See also* Washington Gas Light Co. v. Baker, 188 F.2d 11, 21 & n.43 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951) ("We recognize that the *legality of past rates may not be challenged*, and that *past excessive earnings belong to the Company* just as past losses must be borne by it.") (emphasis added); Public Service Comm'n of New Hampshire v. FERC, 600 F.2d 944 (D.C. Cir. 1979) (barring FPC from approving retroactive rate increases); Goodman v. Public Service Comm'n, 467 F.2d 375 (D.C. Cir. 1972) (order establishing fair rate of utility return was final order subject to review even though superseded by later orders); Payne v. Washington Metro Area Trans. Comm'n, 415 F.2d 901, 910 (D.C. Cir. 1968) ("established ratemaking principle[s] . . . preclude[] a utility from charging higher fares in the future in order to recoup past losses"); TWA v. C.A.B., 385 F.2d 648 (D.C. Cir. 1967); City of Chicago v. FPC, 385 F.2d 629 (D.C. Cir. 1967); Gas Service Co. v. FPC, 282 F.2d 496 (D.C. Cir. 1960); Memphis Light, Gas & Water Div. v. FPC, 250 F.2d 402 (D.C. Cir. 1957); *cf.* Greater Boston Television Corp. v. F.C.C., 462 F.2d 268, 291, *cert. denied*, 406 U.S. 950 (1972) (res judicata bar to retroactive proceeding).

> to be charged by a public utility, being essentially legislative in character, ordinarily speaks only for the future. And we find nothing in the statutory provisions governing the Commission's regulatory responsibilities that indicates an intent to depart from this "customary pattern of fixing rates prospectively." Hence, we conclude that the Commission lacks power to enter a new rate order in this proceeding, and that a remand for further consideration is not called for.[21]

Having ruled out remand as a remedial step, the court in *Williams* turned to the formulation of a restitutionary award. However, quite unlike the approach of the majority here, the court, invoking venerable principles of equity, adopted a flexible, rather than a maximalist, approach to restitution:

> Since restitution is not a matter of right, but is "*ex gratia*, resting in the exercise of sound discretion," it lies within our authority to direct restitution in an amount less than the whole sum of the increased fares collected under the invalid order, or to deny it altogether, if compelling equitable considerations so dictate.

Id. at 944 (citations omitted). Thus, also in contrast to the instant case, the court chose, in *Williams*, to award only partial restitution, holding that "it would be unfair to order Transit to restore the full amount it realized under the invalid fare increase." *Id.* at 945. And, unlike the majority here, the court was highly sensitive in *Williams* to the substantial effect the intervening time might have on the validity of rate orders and the error inherent in perpetuating one determination of invalidity far beyond its effective period:

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[21] 415 F.2d at 940-41 (citations omitted). The opinion cited (*id.*, at 941 n.95) Washington Gas Light Co. v. Baker, 188 F.2d 29, 35 (D.C. Cir. 1951), in which this court held that "[r]emand to the Commission, in the circumstances of this case, could not be to enable a rate order to be superimposed upon the old application . . . .".

> [W]e are confronted by circumstances indicating a substantial probability that it would be inequitable to compel Transit to restore the entire amount it realized from the fare increase. . . . We could not permit the Commission's latter conclusion to control the amount of restitution now to be ordered, since it was based on a record reflecting conditions in years later than the period relevant here, and it did not purport to be a determination of a fair return for the years with which we are concerned. . . . *[W]e are unable to see how any proper resolution of the matter of restitution in the circumstances presented could ignore the reality of Transit's financial experience during the years in question.*

Id. at 944-46 (citations omitted; emphasis added). Ultimately, the *Williams* court decided to "compel Transit to restore the amount realized by the fare increase only to the extent that its actual return [was] not reduced to an amount which all parties have agreed would be unreasonably low." *Id.* at 946. Transit was therefore permitted to retain "any portion of the higher fares necessary to preserve its actual earnings during the years in question at the level conceded by the protestants to represent a fair return." *Id.* Although, concededly, the Commission here has not been as hospitable to Transit's claims as the protestants in *Williams* apparently were, the decision of the majority to completely jettison the subtle approach of the court's earlier equitable opinion is not logically tenable.

In several recent cases involving the precise D.C. Code provisions applicable here, the D.C. Court of Appeals has also barred the type of retroactive utility ratemaking which the majority orders here. In the interest of brevity, one example will suffice. In *Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 380 A.2d 126 (D.C. App. 1977), reviewing a utility's petition to set aside a Public Service Commission rate order as confiscatory, the D.C. Court of Appeals emphasized both the limited scope of its authority

to review Commission orders and the solicitude afforded utilities which increase rates to match costs and earn a fair rate of return. *Id.* at 131-32.

More importantly, the court rejected the idea that a rate could remain applicable for any period beyond that for which it was effective by its terms, holding that "a valid test period [for forecasting rate requirements] must be based on the utility's most recent actual experience, with adjustments for all known changes affecting costs and revenues for the immediate future." *Id.* at 133. The decision recognized very coherently the principle, ignored or forgotten by the majority, that superseding rates are often very different animals than their predecessors, and respond to a wide array of costs, needs and circumstances that are different and newly developed. Hence, in holding that earlier rates were no longer viable and that higher charges were merited, the D.C. Court of Appeals held:

> It is well settled that the rate maker may not rely on out-of-date information when more recent actual experience, which shows a substantial disparity between the earlier forecasts and the rate of return actually earned, is available. . . . Suitable adjustments must be made to accommodate the latest available relevant data. . . .

Id. at 134 (citation omitted).

With respect to relief, the court ordered that "the Commission . . . place itself in a position to provide the rate relief it legally was bound to give *at the time* of its [earlier order]. . . . To do otherwise would be to give *perpetual legal effect* to an unlawful order, and to unnecessarily and unwarrantedly penalize Pepco, its investors, and indeed its customers for the passage of time necessitated by appellate review of that unlawful order." *Id.* at 148 (emphasis added). It is this principle of *separating the period of one rate order from another*

that the majority refuses to observe.[22] In lieu thereof, the majority creates a "rate base" theory out of whole cloth and notwithstanding the provision of the applicable statute that the superseding orders establishing rates here are "prima facie reasonable," the court applies a "rate base theory" that perpetuates an invalid order *ad infinitum* through all the superseding rate orders. D.C. Code 43-703 (1967). The majority ignores the fact that the *nunc pro tunc* invalidation of Order 773 does *not* mean that superseding rate orders, duly adopted as reasonable adjustments on the basis of "the latest available operating data,"[23] are merely incremental to the earlier order and therefore invalid. Rather, the superseding orders are independent successor rate determinations that are "prima facie reasonable" (*id.*) and hence valid until the contrary

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[22] *See also* People's Counsel of the District of Columbia v. Public Service Comm'n, 455 A.2d 391 (D.C. App. 1982) (affirming order granting rate increase since Commission properly used utility's end of period rate base rather than average test year rate base to counter effect of attrition); Potomac Elec. Power Co. v. Public Service Comm'n, 402 A.2d 14, 18 (en banc) (D.C. App.), *cert. denied*, 444 U.S. 926 (1979) ("[i]f recent operating figures are completely ignored, the new rate will be based on old and perhaps no longer valid data . . . . Although . . . the rights of the company to rate relief must be balanced against the interests of the consumer . . . it is nonetheless important, in fairness to all, that the latest available operating data not be ignored."); Washington Gas Light Co. v. Public Service Comm'n, 452 A.2d 375, 379, 382-83 (D.C. App. 1982) (approving utility rate increase as a result of market pressures and flotation costs associated with issuance of common stock; invoking policy against retroactive ratemaking and holding that rate orders of Public Service Commission, like those of FERC in federal context, entitled to great deference); Wash. Gas Light Co. v. Public Service Comm'n, 450 A.2d 1187 (D.C. App. 1982); Chesapeake & Potomac Tel. Co. v. Public Service Comm'n, 330 A.2d 236 (D.C. App. 1974).

[23] *See* Potomac Elec. Power Co. v. Public Service Comm'n, 402 A.2d at 18.

is found in a due process "action"—a presumption which ratepayers only challenged in one subsequent case, and then only with partial success.[24]

One final case which the majority fails to even mention, despite its widespread citation as authority against retroactive ratemaking, merits attention here. In *Commonwealth v. Old Dominion Power Co.*, 184 Va. 6, 34 S.E. 364 (1945), a suit by purchasers of electrical energy against a utility for refund of overcharges, the Virginia Supreme Court was faced, as this court is faced today, with superseding rate orders.[25] The court held that the Commission was without authority "to put into effect, retroactively, reduced rates applicable to petitioners, and require the power company to refund to them the overcharges collected of them." 34 S.E. 2d at 366. Applying state laws similar to the D.C. Code provisions applicable here, the court affirmed that ratemaking could be prospective only. The case holds:

> There is nothing in any of the statutes to which we have referred which either expressly or impliedly gives the Commission authority to give retroactive effect to rates which may be substituted by it for the existing rates of any public utility . . . . On the contrary . . . the statutes are designed to fix rates for the future. . . . The action of the Commission shall have a prospective rather than a retrospective effect.

Id. at 367-68. The statutes here, as in *Old Dominion*, confer no power to engage in retroactive ratemaking.[26]

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[24] *See supra* n.12.

[25] One rate took effect on May 1, 1939, the other on July 23, 1941.

[26] The statutory law here, as in *Old Dominion*, is therefore distinguishable, for example, from the express power given the Interstate Commerce Commission, under the Interstate Commerce Act, to engage in retrospective regulation.

The rate orders reviewed in *Old Dominion* were, as were those promulgated by the Commission here, presumed to be reasonable and effective until altered in the manner and within the period provided by statute, at which time the newly enacted rate would then become entitled to such presumption.[27] This conclusive presumption of reasonableness applies to each of the superseding rates approved by the Commission after Order 773 was superseded. The court today simply ignores the mandatory statutory presumption of reasonableness, and in its place applies a *de facto* presumption of *un*reasonableness based on a prior —and *essentially unrelated*—invalidation.

The majority thus erroneously stretches the restitutionary period from the 277 days that Order 773 was in effect for an additional 1,549 days until Transit, on January 14, 1973, was taken over by public authorities under the power of eminent domain. Giving such perpetual effect to Order 773 contravenes the heavy weight of authority both in this Circuit and elsewhere against retroactive ratemaking. Restitution in this case should be awarded *only* for overcharges received during the period that Order 773 was in effect, i.e., until it was superseded by Order No. 882 on October 18, 1968.[28] The ma-

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[27] 34 S.E.2d at 368 ("[R]ates are commission-made, and as long as they are in force they are conclusively presumed to be reasonable . . . [t]he Commission has no power to declare them unreasonable retroactively once they are legally established. . . ." (*quoting* Mathieson Alkali Works v. Norfolk & Western R. Co., 147 Va. 426, 447, 137 S.E. 608, 614 (1927)); *see also* City of Norfolk v. Va. Elec. & Power Co., 197 Va. 505, 90 S.E.2d 140, 148 (1955) (reviewing Commission's authorization of rate based on utility's use of "escalator clause" which tied charges to company's costs; Commission could not "condemn rates retroactively once legally established . . . [and did] not have the power to redetermine rates for a past period at a different level from those actually charged in accordance with filed schedules because that would be to make retroactive rates.") (*citing Old Dominion*, 184 Va. at 15, 34 S.E.2d at 367-68).

[28] *See supra* note 12.

jority's perpetuation of the invalidity of Order 773 far beyond the period that it was effective, on the rationale that all subsequent orders were merely incremental to Order 773, constitutes an untimely, outlawed and unprecedented departure from the statutory presumption of reasonableness and validity that accompanies duly adopted rate orders. Such conclusion constitutes nothing more than a *post hoc* rationalization for retroactively invalidating rate orders for alleged "incrementalism" when the orders themselves bore no indication of "incrementalism." In this, the majority commits the error of *post hoc* rationalization which the Supreme Court warned against in *SEC v. Chenery*, 332 U.S. 194, 196 (1947), and *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-69 (1962).[20]

The opinion of the majority, in its claimed reliance on "equity," also violates the time-honored principle that "equity aids the vigilant, not those who slumber on their

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[20] In *Chenery* and *Burlington Truck Lines*, the Supreme Court held it unlawful to *sustain* administrative orders on a basis not set forth in the order. *Chenery* stressed the "fundamental rule of administrative law . . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency*." 332 U.S. at 196 (emphasis added). The same reasoning applies by analogy when petitioners seek to *modify* a rate order on the basis of some element not announced in that order. Here, the Opinion challenges an order on the basis that it was incremental, *even though there was no statement or assertion* in any of the four orders that superseded Order 773 that the rates fixed by such subsequent orders *were merely incremental or were not based on the most recent financial data that was before the Commission.* Rather, each subsequent fare order represented, *at the time of its issue*, a reasonable charge for mass transit service. The majority seems to have conjured up a contrary conclusion here as a mere post-hoc rationalization for imposition of what it deems an equitable result, long beyond the date that the statute of limitations would permit an attack on the rate fixed by any of the superseding orders.

rights." 2 J. Pomeroy, *Equity Jurisprudence* 169 (5th ed. 1941).[30] To treat all superseding orders as having been determined on an incremental "rate base" approach at this late date, when farepayers were not vigilant and failed timely to attack Orders 882, 900, and 984 on that ground, would thus award petitioners a wholly unjustified windfall benefit at Transit's expense.

The majority opinion, finally, is internally inconsistent. In closing, it states that:

> The Commission must ensure that the total amount of restitution does not exceed the total of the fare excesses purportedly authorized by the orders under review in these cases.

Opinion at 37. However, the truth of the matter is that by extending 773 as an ongoing fare order for 1,549 days despite the short life of 277 days during which it was effective, the majority extends the operation of Order 773 to periods covered by all subsequent orders that were never properly challenged by any "action" as required by the statute.

III. *Equitable Adjustments to the Restitutionary Award*

Finally, I cannot concur in the rejection by the majority of four of Transit's five requests for equitable adjustment of the restitutionary award. Transit advances five grounds for such adjustment, as follows:

(1) Investors should not be denied a reasonable rate of return on their investment.

The majority (at 25-26) rejects this argument. I cannot agree, for the reasons discussed in Part I.

(2) Transit should keep the gain from appreciation in value attributable to the difference between market and book value.

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[30] *See* Jinks v. Mays, 464 F.2d 1223, 1227 (5th Cir. 1972), *reh'g denied*, 471 F.2d 649 (5th Cir. 1973).

The majority (at 26-27) rejects this argument as well. I disagree, because denying Transit such gain deprives it of both the benefit of the bargain that it struck and the fair return due on its capital investment.[31] Moreover, under settled principles of utility regulation, such deprivation is confiscatory and therefore violative of the Fifth Amendment to the Constitution.[32]

(3) Transit should be credited for payments made to the District of Columbia in accordance with the agreed settlement of the company's contractual obligation to remove abandoned trolley tracks and repair streets.

The majority (at 27-29) denies any such equitable offset. The position of the majority on this point is especially curious in light of its allowance of deductions for brokerage fees and taxes (*id.* at 17-18) and capital gains taxes (*id.* at 18-22) paid by Transit on the sale of the Fourth Street Shop and Southern Carhouse. Such offsets are consistent with similar allowances we have made earlier in this litigation,[33] and accord with estab-

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[31] *See supra* Part I; *infra* n.32.

[32] *See* Chicago M. & St. P.R. Co. v. Minnesota ex rel. Railroad & Warehouse Comm'n, 134 U.S. 418 (1890):

> If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of this Constitution of the United States; and insofar as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

134 U.S. at 458. *See generally* E. Nichols, *Ruling Principles of Utility Regulation: Rate of Return* 10-13 (1955).

[33] *See* D.C. Transit System, Inc. v. Washington Metro. Area Trans. Comm'n, 485 F.2d 881 (D.C. Cir. 1973).

lished precedents of this Court. "As a general proposition," we held in *Public Service Co. of New Mexico v. Federal Energy Reg. Comm'n*, 653 F.2d 681, 683 (D.C. Cir. 1981), "a regulated utility is allowed to recover from ratepayers all expenses incurred, including income taxes, plus a reasonable return on capital invested in the enterprise and allocated to public use." [34]

(4) Transit is entitled to an offset for earlier monies credited to the farepayer fund.

The majority grants such an offset. I concur, for the same reasons that I would grant the track removal/street repair offset.

(5) Transit may recoup from farepayers any deficiency which existed in its reserve for injuries and damage at the time that its franchise was terminated.

The majority denies such recoupment. I dissent from this denial, because Transit could have passed this deficiency on to farepayers, recovering what it needed through a higher fare. Since this was an uncompensated expense, Transit is, on the strength of the authority cited for claim (3) above, entitled to an equitable offset.

CONCLUSION

In sum, while I concur in Parts I and III of the court's opinion, I must respectfully dissent with respect to Part II. Interest should only be computed on Order 773 during the 279 days it was in effect; and restitution should not be computed for any fares received after October 18, 1968 (the date on which Order 773 was superseded by Order 882). Moreover, in calculating the award due farepayers, the Commission should not allocate restitution based on Transit's gains from transfer of non-depreciable assets, and should also make the equitable adjustments in the award which the majority rejects.

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[34] *Accord*, Nepco Municipal Rate Comm'n v. Federal Energy Reg. Comm'n, 668 F.2d 1327, 1335 (D.C. Cir. 1981).

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION
WASHINGTON, D.C.

ORDER NO. 773

IN THE MATTER OF:	Served January 26, 1968
Application of D. C. Transit System, Inc., for Authority to Increase Fares.	Application No. 453 Docket No. 156
Application of D. C. Transit System, Inc., for Authority to Increase its Fleet in Lieu of Purchasing Buses.	Application No. 436 Docket No. 156

APPEARANCES:

HARVEY M. SPEAR, LAWRENCE W. HANTMAN, SAMUEL M. LANGERMAN, attorneys for D. C. Transit System, Inc., Applicant.

S. HARRISON KAHN, attorney for Alexandria, Barcroft, and Washington Transit Company, Protestant.

TILFORD E. DUDLEY and WILLIAM A. GRANT, attorneys for the Democratic Central Committee of the District of Columbia, Intervenor.

ALFRED S. TRASK, for the Federation of Citizens Associations of the District of Columbia, Protestant.

DIANA K. POWELL, pro se and for Republican Precinct 17, Protestant.

WILLIAM O. DOUB, People's Counsel for the State of Maryland, Intervenor.

RUSSELL W. CUNNINGHAM, General Counsel, Washington Metropolitan Area Transit Commission.

BEFORE GEORGE A. AVERY, CHAIRMAN, AND SOLOMON LISS, VICE CHAIRMAN.

WMATC Order 773

On September 1, 1967, D. C. Transit System, Inc. ("D. C. Transit"), filed Application No. 453 with the Washington Metropolitan Area Transit Commission ("Commission") seeking authority to increase certain of its fares for the transportation of passengers intrastate within the District of Columbia and Maryland, and interstate between the District of Columbia, Maryland and Virginia.

D. C. Transit's application, accompanied by appropriate tariffs, testimony and exhibits, requests authority from the Commission to establish the following fares:

1. Cash fare of 30¢ for regular route service within the District of Columbia (presently 25¢ cash).

2. Four tokens for $1.10 for regular route service within the District of Columbia (presently 4 for 98¢).

3. Transfer charge of 5¢ for regular route service within the District of Columbia, except for students using school tickets (presently free of extra charge).

4. Discontinue sale of D. C. Transit interline ticket (presently 35¢ cash plus 5¢ additional in fare box).

5. Discontinue acceptance of interline ticket sold by other carriers (presently accepted with deposit of 5¢ in fare box).

6. Discontinue sale of 40¢ ticket for Maryland – District of Columbia local interstate service.

7. Cash fare of 40¢, or 13¢ plus a valid D. C. Transit District of Columbia transfer or token, for Maryland – District of Columbia express interstate service between the District of Columbia and the Maryland – District of Columbia Line (presently 35¢ cash, or 10¢ cash plus a valid D. C. Transit transfer or token).

8. Cash fare of 33¢ plus either a valid D. C. Transit District of Columbia transfer or token for Capitol Hill Express Service (presently 40¢ cash plus valid D. C. Transit transfer).

9. Cash fare of 75¢ for seasonal operations between points in the Washington Metropolitan Area and D. C. Stadium (presently 60¢).

10. Discontinue issuance and acceptance of transfers on the Silver Rocket Express.

On September 15, 1967, the Commission issued Order No. 735 which scheduled the matter for public hearing, made provision for the availability of D. C. Transit's proposed testimony and exhibits, and directed applicant to post on its buses, and publish in a newspaper, notice of the time and place of the scheduled hearing.

Order No. 739, served September 29, 1967, suspended applicant's Supplement No. 2 to WMATC Tariff No. 35, Supplement No. 1 to WMATC Tariff No. 38, Supplement No. 1 to WMATC Tariff No. 4, Supplement No. 1 to WMATC XA No. 2, Supplement No. 1 to WMATC XA No. 3, and Supplement No. 1 to WMATC XA No. 4, and assessed applicant the sum of $12,000, the sum reasonably anticipated to compensate an independent public utility consultant having expertise in, and knowledge of, the subject of rate of return.

On May 26, 1967, D. C. Transit had filed Application No. 436 with the Commission seeking authority to increase its fleet of mass transit buses in lieu of purchasing buses pursuant to Commission Order No. 362, as follows:

1. Purchase or lease 25 new air-conditioned buses.

2. Purchase or lease 45 used diesel buses (of model years 1956 or later), such buses to be reconditioned and to have air-conditioning installed if they are not air-conditioned.

3. Recondition and return to service 30 buses currently owned by D. C. Transit which have been previously removed from service, such buses to be used only during rush hour periods and for "tripper" service.

4. Sell between 20 and 25 over-the-road buses currently used exclusively for charter and sightseeing operations.

5. Substitute the above actions for the provision of Commission Order No. 362 which required the purchase in 1964 and each year thereafter of a number of new air-conditioned buses equal to one-twelfth of D. C. Transit's fleet of buses.

Application No. 436 was still pending final determination when Application No. 453 was filed. It was obvious that each of these applications would have a serious effect on the other. Accordingly, the Commission issued Order No. 741 on September 29, 1967, consolidating the applications for hearing in Docket No. 156 and requiring publication in a newspaper of the time and place of the scheduled hearing.

Notice having been duly given in accordance with the Commission's Rules and Regulations, public hearings began on October 12, 1967. Five formal parties were admitted to the proceeding, and the Commission processed in excess of 85 informal protests, petitions and letters in connection with the proposed fare increases, bearing more than 1,155 signatures. Two evening sessions of the public hearings were held, one in the District of Columbia and one in Maryland, to afford interested persons, other than formal parties, an opportunity to present their views. On these occasions 7 persons appeared and made statements for themselves or for organizations they represented. Such statements constituted 257 pages of transcript.

Fifteen sessions of the public hearing were held between October 12, 1967 and January 18, 1968, inclusive, producing 111 exhibits and a transcript of 2,716 pages.

D. C. Transit presented the testimony of its Vice President and Controller, Samuel O. Hatfield; its Vice

President, Research and Development, William E. Bell; and John F. Curtin of Simpson and Curtin, independent consultants.

The Commission's staff presented the testimony of its Chief Engineer, Charles W. Overhouse, and of its Chief Accountant, James P. Marquart, and the testimony of David A. Kosh of Kosh-Glassman Associates, an independent rate of return consultant.

Protestant Powell presented the testimony of herself and Miss Marie F. Harley, a rider of applicant. Intervenor Democratic Central Committee of D. C. adduced testimony of applicant's witness Hatfield and of Mr. Paul D. Pearlstein. Protestant Federation of Citizens Associations presented the testimony of Mr. Alfred S. Trask. Protestant A. B. & W. Transit Company presented the testimony of its Vice President and General Manager, Richard F. Lawson.

With the exception of A. B. & W., all of the protestants and intervenor Democratic Central Committee opposed the fare increases proposed for regular route service in the District of Columbia. A. B. & W. opposed only the proposal to discontinue the "interline ticket" arrangement.

Oral argument was presented by Harvey M. Spear, attorney for applicant; and by William A. Grant, attorney for intervenor Democratic Central Committee of D. C.; and by S. Harrison Kahn, attorney for A. B. & W. Transit Company, Alfred S. Trask representing the Federation of Citizens Associations of D. C., and by Miss Diana K. Powell, Protestant.

By this opinion and order, we are, for the second time in less than a year, raising D. C. Transit's fares. In the material which follows we discuss in detail, in accordance with accepted methods of analysis in rate proceedings, the evidence presented to us in this proceeding and the conclusions we draw therefrom. It would per-

haps be well to state at the outset in somewhat simpler terms the essential nature of the problems. We set rates which will produce revenue sufficient to cover all the company's expenses and provide it with a fair return. This is done by projecting revenues and expenses for a period of time in the future. The simple fact is that over the 12 months ending October 31, 1968, D. C. Transit will be required under its labor contract with its operators' union to pay wage increases which will increase its total labor expenses by about $1,500,000. The money to cover these expenses must be generated somewhere and, under present circumstances, the only source for that is the fare box.

The company's expenses have been rigorously examined, and only those which are both justifiable and reasonably predictable have been allowed. We have carefully considered the amount of return, or profit, which should be allowed to the company and we have, after careful deliberation, arrived at a rate of return which is fair and equitable to the applicant as well as to the ratepayers.

A central fact about the present rate case is that it follows so closely upon the last such case. By our Order No. 684, we granted the company certain fare increases effective March 15, 1967. The decision to file the present case was made by company management in early June, 1967, at a time when it had available only two months of results under the increased fares. Indeed, the company's case, as first presented to this Commission, was based on data for a historical year ending May 31, 1967 – a year, therefore, which included only two and one half months of experience under the new, higher fare structure. The Commission was not content with just that data, however, and the record now contains information as to the company's operating results through November, 1967, i.e., for eight full months following the fare

increase. In the eight full months from April through November, 1967, the company had operating revenues of $24,615,223; operating revenue deductions of $23,228,859; and a net operating income of $1,386,364. This produced a rate of return on gross operating revenues for the eight month period of 5.63%.[1]

It appears, therefore, that the rate increase we granted in March, 1967, achieved the results we sought and that since it was instituted, the company has operated in a financially healthy condition. We regard these figures as important since they are the best indication of the company's current financial condition. They are certainly more useful than figures for past periods which include operations under the old fare structure. We have used these current figures to test the validity of a number of projections made by the parties. Obviously, this exposition of current operating results does not end our inquiry since we set rates not on the basis of past results but *in futuro*, on the basis of projections for a future annual period. The future annual period used by both the company and the staff in this proceeding was the

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[1] The Outlook for the twelve month period following the rate increase may be even better than these figures indicate since the eight month period contains fluctuations which may smooth out over the full twelve month period. For instance, on a month by month basis, the rate of return has fluctuated from a high of 10.24% in June, 1967, to a loss of 2.20% in November, 1967. In the latter month, operating revenues were 7.7%, or $204,000 over the same month of the previous year; operating expenses increased at the lower rate of about 5.8%, or $141,000. November, 1966 showed a net operating income mainly because of a $190,000 credit adjustment for income taxes, whereas November, 1967 had no provision for income taxes whatever. Judging from the income statement produced by the company for the 11 months ending November 30, 1967, an income tax credit adjustment, similar to the one made in November, 1966, should also have been made in November, 1967, converting the book loss to a book profit for the month.

It is important to bear in mind that the operating results quoted here are company figures which have not been subject to audit review beyond August, 1967.

twelve-month period ending October 31, 1968. We conclude that in that period the company can expect the following results, assuming no change in fares.

TABLE I

Operating Revenues:	
Passenger Revenue	$34,320,612
Charter	2,229,650
Government	127,790
Limousine	–
Station and Vehicle	169,153
Other	76,255
Total	$36,923,460
Operating Revenue Deductions:	
Operating Expenses	$31,997,863
Taxes, Other than Income Taxes	1,074,753
Income Taxes	106,467
Depreciation	2,394,647
Amortization of the Acquisition Adjustment	(194,516)
Total	$35,379,214
Net Operating Income	$ 1,544,246
Rate of Return	4.18%
Operating Ratio	95.82%

The extent to which differences existed in the forecasts of the parties can be seen by operating results estimated by the applicant in its Exhibit No. 45:[2]

Gross Operating Revenues	$36,521,343
Operating Revenue Deductions	35,949,452
Net Operating Income	$ 571,891
Percentage of Net Operating Income to Gross Operating Revenues	1.57%

[2] Exhibit 45 was part of the company's rebuttal testimony. It had previously forecast gross operating revenues for the future annual period at $36,411,558, operating revenue deductions of $35,628,437, and net operating income of $783,121 – a return of 2.15% on gross operating revenues.

In reaching this conclusion we have resolved certain issues of fact which should be discussed at this point. First, there were certain items of revenue in dispute between the staff and the company.

Passenger Revenues

We accept the staff's figure for passenger revenues. This figure was reached by taking as a base the passenger revenue figure for the twelve months ending October 31, 1967. This figure was then adjusted in two ways. First, a resistance factor of .20% for each 1% increase in fares was applied to the figures for the period November 1, 1966 through March 31, 1967 to give retroactive effect to the fare increase granted in March, 1967. Second, the figures for various passenger groups such as token, cash, etc. were adjusted by applying growth or decline trend factors developed for each such group.

The staff figure for passenger revenues is higher than the company's figure by some $299,000, principally because the staff used a resistance factor of .20% for each 1% increase in fares while the company used a .328% resistance factor. We believe the staff's approach was more accurate. The company purported to develop its .328% figure from data related to the last fare increase but its approach was questionable. In March, 1967, the cost of tokens was increased from 4 for $.85 to 4 for $.98 but the cash fare remained at $.25. The result was that many riders switched from using tokens to paying cash. The company developed a figure for the number of persons who stopped riding altogether, as well as a figure for the number who switched from tokens to cash. However, when they computed the *percentage* of token riders lost, they excluded from consideration the number of passengers who switched from tokens to cash. In other words, the company applied the computed number of lost riders to the total number of token riders

excluding those who switched and determined a percentage of loss. This methodology ignores the fact that those who switched were not lost customers and exaggerates the degree of loss.[3]

Independent checks of the results achieved confirms the fact that a resistance factor of .20% is more valid than the company's .328%. The factor of .20% has been used repeatedly by both the company and the staff in the past rate cases. It was used by both in the last D. C. Transit rate case. The revenues the company is receiving are at about, or perhaps a little above, the level predicted after using the .20% figure in the last rate case. If the .328%, factor were valid, the company would not currently be receiving revenues of this magnitude.

The company itself indicated some doubts as to its methodology. Using its method of calculating the percentage of token riders lost which excluded from consideration those who switched to cash, the company initially concluded that it had lost over 6.2% of its token riders. The company itself then arbitrarily reduced this percentage loss by 20%, i.e., down to 5.01%. (Co. Ex. 3, Sch. 1A Corrected). This indicates that the company itself had some doubts about the result it reached.

In any event, in our judgment it is sounder to use the .20% resistance factor used by the staff in this case and by both the staff and the company in past rate cases. Hence, in Table I above, passenger revenue for the future annual period at present fares is $298,763 higher

[3] A hypothetical example may illustrate the fallacy more clearly: Without the fare increase the company, in a given period, would have had 25,000,000 token riders. The actual number of token riders, with the fare increase, was 14,000,000. Analysis reveals that 10,000,000 token riders switched to cash and 1,000,000 stopped riding. The company lost not one out of 14 riders, as it would claim, but one out of 25.

than was urged by the company because we have used a lower retroactive resistance factor than that used by the company.

Note that we are adopting the .20% factor only in dealing with the historical period, which has the effect of carrying forward into the future annual period as long as there is no change in fare structure. To the extent that any changes are made in the fare structure, to that extent judgment must be exercised in determining whether or not the .20% resistance factor experienced in the past will continue or whether possibly a greater resistance will make itself felt due to the nature of changes which may be made. This will be discussed at a later point in this order.

Charter Revenues

In Table I above, we project charter revenues for the future annual period in the amount of $2,229,650. Originally, the company had projected $2,028,733, a figure based solely on the judgment of its management that charter revenues in the future annual period would be substantially the same as in the period ending May 31, 1967. The staff projected charter revenues at a higher level than the company based on an analysis of growth trends for charter work and the company eventually accepted the staff's estimate with the exception of one item. The company's estimate for charter revenues was raised by $120,963 (Exh. 45), leaving $79,954 in dispute. This represents estimated sightseeing revenue generated in nearby Virginia.

The company claims that we should eliminate the entire amount presently attributable to sightseeing patrons who are picked up at their Virginia hotels and transported to D. C. Transit's sightseeing headquarters in the District at no additional cost to the patron. This pickup service was performed for D. C. Transit by its subsid-

iary W. V. & M. under charter arrangement. The staff claims that this arrangement is unauthorized and would disallow the expense of the charter. D. C. Transit counters that if this is done the entire revenue must be eliminated. In our view, a substantial number, if not all, of these patrons would still use D. C. Transit's sightseeing service even if free transportation to the District were not provided. We believe D. C. Transit's elimination of this item is too speculative and we accept the staff's estimate *in toto.*

Station and Vehicle Revenue

There is only one item in dispute in this category. The staff recommends that we impute income to D. C. transit in the amount of $23,400 attributable to the fact that D. C. Transit makes available on its buses space for the distribution of the D. C. Examiner. This is a newspaper published once a week which is owned by the principals of D. C. Transit. The paper is placed on D. C. Transit buses and is free to bus patrons. The staff points out that this distribution to bus riders is of value to the Examiner's publishers. They can point out to potential advertisers a "captive" audience of many thousands of persons. D. C. Transit counters that it also derives benefits from the arrangement in that it is able to provide an amenity to its riders, i.e., a free copy of a newspaper which sells on news stands for $.10. It seems clear, however, that the benefits, in monetary terms, to the Examiner clearly outweigh the benefits to D. C. Transit. It can be said that D. C. Transit receives monetary benefits from the Examiner only if it is believed that some persons ride the bus in order to obtain a free copy of the paper. D. C. Transit offered no proof that there were such persons and we feel that it is contrary to common sense to believe that there are. On the other hand, the availability of readership among bus patrons must be of

considerable value to the Examiner in selling advertising and, beyond question, increases the revenues from that source. Hence, we believe that the bus company should be compensated for the benefit it makes available to the advertiser. The amount suggested by the staff is a conservative figure, based on estimated circulation and established distribution commission rates. We will accept the staff's figure and increase the company's estimate of station and vehicle revenues by that amount.

Operating Revenue Deductions

Turning now to expenses, the figures shown in Table I above are the result of certain determinations we have made concerning disputed items of expense and we will discuss each of these items separately.

Wage Expense

The company projects wage expenses for the future annual period at a level $430,259 higher than the staff's projection. As in past rate cases, the difference involves the treatment of wage increases based upon the cost of living index. In this case, however, the problem is somewhat different than that we have previously faced. In past rate cases, the labor contract provided that at certain dates, after the conclusion of the rate case, wage increases would be granted, *provided* that on the date involved, the price index had increased to a certain level. The company urged us to find that the index would indeed increase to the pertinent level and asked us to allow for the increased wages which would result. It was our consistent policy to refuse such requests. We would not allow for wage increases that had not materialized. We included in our calculations only those wage levels justified by the price index at the time we were rendering our decision.

The contract now before us differs from the earlier contracts just described. It guarantees "cost of living" increases in certain fixed amounts at stated intervals up to April 28, 1968. These increases will total 7½ cents per hour by April 28, 1968. At that date, a further fixed increase of 7½ cents per hour becomes payable. However, at the same time, the previously mentioned "cost of living" increases must be reassessed. If the Consumer Price Index at February 15, 1968, has fallen back to the level at which it stood on August 15, 1966, all of the previously granted "cost of living" increases totalling 7½ cents per hour will be eliminated. Similarly, some portion of the "cost of living" increases could be lost if the index at February 15, 1968, is above the August 15, 1966, level but is not sufficiently high to justify, under a stated formula, the full 7½ cents per hour "cost of living" increases granted up to April 28, 1968.

The staff characterizes the "cost of living" increases as being "unguaranteed" after April 28, 1968. As previously noted, we have regularly disallowed wage increase expense attributable to cost of living increases which will occur in the future only if the index increases to a certain level. The staff disallowed the expense of the previously described "cost of living" increases after April 28, 1968.

We do not agree with the staff's treatment of this expense. Specifically, we do not agree that disallowing the "unguaranteed" cost of living increases here in question for the period subsequent to April 28, 1968, would be consistent with our past practice of disallowing future cost of living increases. What we have done in the past is to allow those increases called for by the index level at the time we were preparing our decision but we have refused to predict what future index levels might be.

Disallowing the cost of living increases in the manner suggested by the staff would, of necessity, involve a prediction as to the level of the index. The expense of the wage levels in question will be avoided if, and only if, the cost of living index at February 15, 1968 stands at, or is lower than, the August 1966 level. The record shows that the August 1966 level was 114 and that the index today stands at 117.8.[4] Hence, disallowing the expense in question inherently involves a prediction that the index will decline by almost four points in the next few months. We decline to make this, or any other prediction, concerning the future level of the cost of living index. What we will do is allow the wage expense which is justified by the index as it stands today. At this level, a cost of living adjustment of 11.5 cents per hour would be applicable beginning April 28, 1968, and we will allow the costs involved at that level of wage rates.

We emphasize that in allowing this expense, we are not making a prediction that in April, 1968, the index will stand where it does today. Rather, we are attempting to follow, as closely as we can in view of the terms of the current labor contract, our past practice of allowing only those wage expenses which are justified by the current cost of living index.

We conclude, therefore, that the company will incur wage expense in the future annual period which is $1,571,657 in excess of such expenses during the historical period. The effect of this adjustment is to disallow the forecast of $85,741 of additional wage payments which the company contends will be incurred at varying points between May, 1968 and October 31, 1968.

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[4] The Consumer Price Index at the conclusion of the taking of evidence on December 20, 1967, stood at 117.3. However, the U.S. Department of Labor released the November 1967 Consumer Price Index on December 22, 1967, showing the new level at 117.8. This information was introduced into the record by the company in the course of oral argument on January 8, 1968.

Salary Increases

The company has projected $174,069 for increases in salaries. The basis for this figure is the assumption that all salaried employees will be given increases of 5.43%, the percentage by which operators' wages will increase during the year. The staff has recommended that this entire item be disallowed. They base this recommendation on a study of overall salary expense during the past few years. They point out that, despite the fact that increases have been regularly granted, overall salary expense has been declining. The annual decline is approximately the amount which the company presently seeks in order to cover increases. In light of the facts brought out by the staff, we must disallow this projected expense. The company has not met its burden of proof that an overall increase in salary expense will actually occur.

Pension Increases

We have allowed $146,396 for increases in pension fund contributions. Pension fund contributions amount to 9% of the wage increase allowed and 7.875% of salary increase allowed. We have applied these percentages to the amounts we have allowed for wage increases including differential pay increases. Since our overall figures for wage increases and salary increases differ from the totals for these categories recommended either by the company or the staff, our pension increase allowance does not agree with either the staff or the company projection for this item.

Savings Due to Bladensburg Consolidation

We have adopted the final figure offered by the company for this item, namely $22,143.

Health and Welfare Contributions

The company ultimately projected an increase in the cost of contributions to the employees' health and welfare fund totalling $239,112. This includes $59,068 attributable to an increase fixed by the terms of the union contract. The remaining $180,044 is based upon a special assessment directed by the fund's trustees on November 14, 1967. Beginning on January 1, 1968, the company will be required to pay an additional $2.00 per week, per employee. On July 1, 1968, this will decrease to $6.00 per month, per employee, subject to review at that time by the trustees. It was testified that the purpose of this special assessment was, first, to cover the increased cost of medical expenses, and second, to make up for past deficits in the fund. On this latter point, it was testified that the fund currently had $200,000 in bills it was unable to pay.

The staff challenged the allowance of the special assessment. They questioned whether the assessment might be withdrawn before it was paid in its entirety. They further raised the question whether it was proper to charge the 1968 ratepayer with the full amount necessary to make up for deficits accumulated over the past.

We have considered these objections. We will assume that this assessment was made in good faith and will continue in effect throughout the period projected. We will, however, carefully watch to see to it that this assumption is fulfilled and if it is not we will take appropriate action. On the other hand, we will not allow the full amount as an annualized expense. It is unfair, in our view, to concentrate in a period of ten months the expense of making up a deficit which may well have been building up for years. While the company may actually make up the deficit at any rate it chooses, we will, for rate-making purposes require that the effect of the special assessment be amortized over a twenty-two month

period ending October 31, 1969, the date on which the current health and welfare agreement expires. The effect of this determination is to allow $80,733, attributable to this special assessment, during the future annual period. Adding this to the increase called for by the contract means that a total of $139,801 will be allowed for this item during the future annual period.

Legal Fees

The staff suggested that we disallow a projected amount totalling $68,613 attributable to legal fees. The staff suggested that these were non-recurring items because they related to completed legal work. They further suggested that the legal expenses of the company were inordinately high and constituted an undue burden on the ratepayer.

The company is entitled to revenues sufficient to cover legitimate expenses. It is perhaps unfortunate, but nonetheless true, that the company has regularly incurred, and will apparently continue to incur, legal expenses in the amounts projected by the company in its exhibits. Considering the volume of litigation in which the company is involved, the amounts charged do not appear to be excessive. In these circumstances, we must allow this expense. Hence, we have rejected the staff's position on this item.

Cost of Existing Management Structure

The staff suggested that we disallow $57,728 in executive salaries on the ground that the existing management structure of the company is "top heavy." We have carefully considered the staff's views on this point. However, we are mindful of the established principle of regulatory law that it is not our function to manage those

subject to our jurisdiction, but to regulate them. We do not feel that the existing executive structure of D.C. Transit constitutes a clear abuse of managerial discretion. In these circumstances, we cannot substitute our judgment for that of the company's directors as to the proper managerial structure for the company. Hence, we will reject this suggested disallowance. It goes without saying, however, that we will maintain a very close scrutiny of the company's managerial structure and we will not hesitate to disallow any expense which, in our opinion, constitutes an abuse of managerial discretion. For instance, officers whose major function vis-a-vis D.C. Transit (D.C.) is peripheral, occasional, casual, and/or advisory, must be properly identified and their salaries properly allocated.

Cash Discounts

The staff suggests that expenses should be adjusted downward by $25,000 to reflect the fact that in the historical period the company did not take advantage of cash discounts in the amount which would have been available for prompt payment. We will not discuss in detail at this point the cash working capital problems encountered by the company in the past. They are discussed at length at pp. 19-21 of this opinion. Suffice it to say that since our Order No. 684 became effective, the company has been earning an adequate rate of return and we anticipate that they will continue to earn such a return following issuance of this Order. In these circumstances, the company is obligated to manage its cash working capital in such a manner that its expenses are kept at the lowest possible level. Since expenses in the historical period were inflated by the failure to take advantage of cash discounts and since continued failure to do so would be unjustifiable, we will reduce the expense

allowance accordingly. Hence, we accept the staff's disallowance of $25,000 attributable to this item.

Expenses of Charter Operations

As noted when discussing revenues earlier, pp. 14-15, *supra,* the staff projected higher charter revenues than did the company and we have accepted the staff's estimate. The staff further pointed out, however, that these additional revenues would entail further expenses and they suggested that we add $47,655 for this item. This amount was calculated on the basis of an estimate by the Commission's Engineering Department as to the number of vehicle hours which would be necessary to produce the additional revenues. The company argues that the number of pay hours attributable to the vehicle hours should be used to calculate the additional expense. This approach was rejected by the staff witness, however. He took the position that this expense projection was a rough estimate at best and he stated that it was his judgment that the dollar expense would be in the amount he calculated rather than the higher amount suggested by the company. We accept the judgment of the staff witness on this item. The company's suggested refinement is merely adding more uncertainty to what is already an estimate. We will rely on the judgment of the staff on this item. Accordingly, we will add $47,655 to expenses, attributable to increased hours of charter operation.

Suspension of Bad Debt Accruals

The staff performed a study of the reserve for bad debts and concluded that the amount in that reserve was considerably in excess of the amount needed on the basis of the company's actual bad debt experience. The amount now in the reserve would cover several years'

accumulation of bad debts. Hence, the staff recommended that accruals to the reserve be suspended for the time being. The company opposes this suggestion, arguing that the accruals were based upon a study done by an independent accounting firm and that they are needed. We are more impressed with the staff's analysis of this reserve and we will accept their recommendation that the accrual expense, amounting to $10,700 in the future annual period be eliminated.

Excise Tax On New Tires

When the company buys new tires, it must pay an excise tax thereon. Until now, it has been the company's practice to charge the entire amount of this tax to expenses at the time of purchase. The staff has suggested that this expense should be amortized over the life of the tire. Specifically, the staff suggests a fifteen month amortization period. They point out that tire life varies considerably but may be as long as two years. To be conservative and fair to the company, they halve this period to twelve months. To this, they add three months in recognition of the fact of both a bookkeeping lag in recording expense and a period of time in which tires are held in inventory prior to use. On the basis of this accrual method, they would reduce expenses in the future period by $27,883.

The company objects claiming, first, that there is no rational basis for the fifteen month accrual period; and second, that if the accrual method is adopted, an adjustment should also be made in the historical year expenses. To this latter point, the staff replies that, when a change to an accrual method is made, there must be some starting point. They believe that the best method for making the change is to start with the future annual period and go forward.

Having considered the positions of the staff and the company, we conclude that, as long as the method in use is applied consistently from period to period, no violence is done to proper accounting principles; amortizing the tax over a future period merely creates a temporary decrease in an operating cost by the use of a bookkeeping device, but the long-run result is unchanged under either method. The staff's proposal is not acceptable.

Pension Contributions for Claims Personnel

The company has an annual expense of $1,300,000 charged to its reserve for injuries and damages. Salaries and other expenses of claims personnel have been charged against that reserve. However, the expense of pension contributions and payroll taxes of claims personnel have, in the past, been charged to operating expenses. The staff has recommended that these expenses also be charged to the reserve for injuries and damages. The company counters that if this is done, the annual charge of $1,300,000 should be increased to cover these additional expenses. It is clear that these personnel-related expenses should be charged against the reserve, just as salaries themselves are. The only question, therefore, is whether, in doing so, we should increase the annual charge.

The data concerning the reserve presented by both the staff and the company convince us that no serious harm will be done to the sufficiency of the reserve by charging these additional expenses against it without increasing the annual charge. The reserve is clearly sufficient to take this additional expense of a relatively small amount for a sufficient period of time to build an experience record of this treatment. At some future time, we can reassess the sufficiency of the annual charge, taking into account the then current claims experience as well

as the effect of these new charges against the reserve. Hence, we will eliminate from operating expenses the amount of $15,313, attributable to pension contributions for claims personnel. We will also reduce payroll taxes by a total of $6,148, the amount of such payroll taxes attributable to claims personnel.

Board of Trade Dues

The staff suggested that we reduce the amount allowed for Board of Trade dues. The expense grouping discussed involved $620, which is made up of annual dues to the Washington Board of Trade for 11 employees at $50.00 each, of $550; the remaining $70.00 was for expenditures of a social or entertainment nature. As the amount of $50.00 for the dues of one employee had already been allowed by the staff, we will increase the expense allowance for this item by an additional $500; the $70.00 amount is not, in our opinion, a proper above-the-line expense.

Taxes

In the historical year, the company accrued $126,000 for Maryland Motor Fuel taxes but paid taxes only in the amount of $54,372. The amount actually paid was based upon interstate miles operated in Maryland. Apparently, there is some question whether, under the old Maryland Motor Fuel Tax Compact, taxes are also owed on intrastate miles operating in Maryland. The company does not believe they are and has paid tax only on interstate miles, while accruing expense on the higher amount. We believe it is sounder to base the allowance for taxes on amounts actually paid. Ordinarily, therefore, we would disallow the full over-accrual, as suggested by the staff. However, there is a complicating

factor. The Maryland law has been changed and, effective July 1, 1968, it is clear beyond question that tax will be owed on both intrastate and interstate miles operated.

In recognition of this fact, we will allow tax expense in the future annual period on the following basis: For eight months of the period, the tax allowance shall be based on taxes actually paid, in the manner suggested by the staff; for four months of the period, we shall allow the full amount as accrued by the company. This recognizes the fact that from July 1, 1968 through October 31, 1968, the end of the future annual period, the company will be liable for the full amount. In sum, therefore, we will disallow $38,998 of the amount projected by the company for Maryland Motor Fuel tax.

One additional tax item requires comment. On the day the company witness was preparing his rebuttal exhibits, the act increasing social security taxes was signed into law. The company hurriedly prepared an additional schedule claiming that this law would increase its social security (FICA) tax expense by $100,000. On cross-examination, it appeared that this figure was based on an assumption that 2500 of the company's employees would earn up to $7800 per year. No study whatever was made to support that assumption. We did not feel that the company had met its burden of proof in support of this claimed expense, and we would disallow it. However, the company and the Commission's staff have studied this problem independently and have arrived at the conclusion that there will be an additional tax cost to the company during the future annual period, on account of this change in the law, amounting to $70,000. This amount is recognized as an operating expense for the future annual period in this case.

Provision for Income Taxes

In forecasting the operating results for the future annual period, the Commission allowed provision for $106,467 of income taxes. In arriving at this tax provision, the Commission follows the policy adopted in previous rate cases, giving no effect to investment tax credits which will accrue to the applicant in the future period. The investment tax credit on the 25 new buses purchased by the company in November 1967 will provide a credit against federal income taxes for the year 1967 in the amount of approximately $60,000; the investment tax credit which will flow from the anticipated purchase of 85 new buses in 1968 is estimated to provide a credit against 1968 taxes in the amount of some $200,000.

The above policy is based upon Section 203(e) of the 1964 Revenue Act, part of which is quoted herewith:

> "It was the intent of Congress in providing an investment credit under Section 38 of the Internal Revenue Code of 1954, and it is the intent of the Congress in repealing the reduction in basis required by Section 48(g) of such Code, to provide an incentive for modernization and growth of private industry (including that portion thereof which is regulated). Accordingly, Congress does not intend that any agency or instrumentality of the United States having jurisdiction with respect to taxpayer shall, without the consent of the taxpayer, use –
>
> (1) in the case of public utility property. . .
>
> (2) . . . any credit against tax allowed by Section 38 of such Code, to reduce such taxpayer's Federal income taxes for the purpose of establishing the cost of service of the taxpayer or to accomplish a similar result by any other method."

Several state regulatory agencies have expressed the view that this Act is binding only upon federal regulatory agencies. We agree. Moreover, this Commission is not a federal agency, but is expressly an arm of the legislatures of the signatory states. Nevertheless, this agency has previously decided – and we concur – that the intent of Congress to provide an incentive to private enterprise to modernize should be accommodated, particularly in the field of mass transit. We have actively and affirmatively sought this goal for carriers we regulate, and, to this end, have recommended certain proposals to the Congress. It would fly in the face of reason, then, to decline to honor its action to spur carriers to modernize their equipment. Thus, Congress has acted, and the carrier under our jurisdiction have responded by massive infusion of new equipment into their fleets. Accordingly, our policy is and will be accommodation of the aim of modernization.

Cost of Fuel and Oil

The company projected an increase in its motor fuel costs for the future annual period in the amount of $92,130. The record in this case shows that, when the company's fuel contract expired on April 1, 1967, it did not accept the lowest bid offered to it by a major supplier of motor fuel. Testimony shows that the company has been paying 10.4¢ per gallon for the major portion of the fuel that it uses – a blend of Diesel No. 1 and 2, instead of 9.95¢ per gallon which was the low bid. The difference in price between the low bid and the price now being paid is projected to amount to $39,353 over the future annual period.

The Commission staff witness suggested that the increased fuel cost projected by the company be scaled down to reflect the lower bid price.

A great deal of testimony appears in the record about this situation; the company's Comptroller testified that he had no detailed knowledge of the negotiations underlying this major facet of his business — but he did say that the previous supplier was owed in excess of $350,000 at the expiration date of the old contract and there was some financial embarrassment involved in accepting a new supplier. Additional cross-examination developed the possibility that whoever was responsible for the fuel contract had made a tactical error in not accepting the low bid before its expiration date. The record shows that the company actually is buying fuel without a price-guaranteed contract today, subjecting the company to the vagaries of fuel price aberrations which may cost the company more than even forecast in this case.

The Commission will accept the company's cost projection for this item in this case, not wishing to penalize it for a mistake in business judgment.

Relocation of Executive and Legal Offices

The original forecast of operating expenses by the company included $32,272 for additional rent at an office building on New York Avenue, N.W., owned by a subsidiary of D.C. Transit of Delaware; provision was also made for a reduction in operating costs at 3600 M Street, N.W., in the amount of $24,762. Although the company's Comptroller, on cross-examination, testified that no rent was being paid for the offices of the company at 3600 M Street, the $24,762 does represent operating expenses in lieu of rent.

The Commission's Chief Accountant disallowed the difference between these two figures, $7,510, because he could not find any justification for the move to more expensive quarters, nor did cross-examination of the company witness develop any such justification.

Disallowance of this item of $7,510 was acceded to when the company submitted its rebuttal testimony and excluded its original adjustment for the new rental basis on New York Avenue. This adjustment therefore will be recognized and the additional rent disallowed.

Depreciation

We come now to what is perhaps one of the most crucial items in this rate case — the question of depreciation. Some background facts are needed as a setting for our decision.

On May 27, 1964, the Commission entered its Order No. 362. That Order authorized the company to depreciate its buses on a twelve year life. That amortization period, however, was specifically made contingent upon a requirement that the company purchase one hundred[5] new air-conditioned buses each year. The purchase was to be made not later than June 1 of each year. The company substantially complied with this Order each year. In the rate case held last year, which was decided by Order Nos. 656 and 684, the company's case, as well as the staff's, was predicated upon the assumption that one hundred new buses would be purchased by June 1, 1967. In that case, the company was specifically asked whether the one hundred buses would be purchased, and an affirmative answer was given.

Nonetheless, on May 26, 1967, the company filed its Application No. 436 with the Commission. In this pleading, the company asked to be excused from purchasing one hundred new buses by June 1, 1967. Instead, the company asked to be permitted to purchase twenty-five new buses, and forty-five used buses. In addition, thirty

[5] The requirement is actually phrased in terms of one twelfth of the fleet. Since the fleet is approximately 1200 buses, this means one hundred buses per year.

buses already in the fleet, but ready to be retired, would be reconditioned and retained in service. Affidavits filed with this application frankly stated that the company was unable to purchase the one hundred buses as required by Order No. 362 because it did not have sufficient cash working capital to make the down payment, estimated at 20% of the purchase price, or over $600,000. This critical cash position, it was stated, was caused by the fact that for the first three months of 1967, the company had been forced to operate at a loss, after the court set aside the Commission's interim order (No. 656), which would have provided the company with revenues sufficient only to cover its expenses and interest commitments for the period needed by the Commission to determine the proper rate of return.

We directed the staff to make a direct investigation of the company's financial position and it was reported to us that it was, in fact, true that the company had incurred substantial losses in the first quarter of 1967, that the company's cash position was critical and that they did not have the cash needed to make a down payment on one hundred new buses.

While this cash position was in some measure due to the losses suffered by the company in the first quarter of 1967, a significant reason for the cash crisis is the write-off of $1,300,000 from the court-ordered Riders' Fund during 1966 which stood in lieu of increased fares; management made no move in 1966 to supply cash for this massive transfer. However, there are additional aspects of the company's cash management upon which we feel constrained to comment. It was brought out at the hearing that, during the period when the company's cash position was critical, there were two significant transactions with other companies in the D.C. Transit corporate structure. First, the company was owed some $70,000 by Transit Card Advertising Co. That company

handles the sale of advertising in the interior of D.C. Transit's buses. It collects the revenues from advertisers and forwards a percentage thereof to D.C. Transit. The amount mentioned above was due D.C. Transit for advertising carried since February, 1967, but had not been paid over by Transit Card Advertising Co. That company is an integral part of the corporate structure in which D.C. Transit exists and ultimate control of the funds of Transit Card is in the same hands as those which control D.C. Transit. It was stated by the company's witness that the bill had not been paid because Transit Card was also suffering from a cash shortage. Nonetheless, shortly after it was brought out at the hearing that this sum was due and owing, it was paid in full to D.C. Transit by Transit Card.

The second transaction involves M Street Estates, Inc., a wholly owned subsidiary of D.C. Transit System, Inc., of D.C. On May 1, 1967, D.C. Transit made a payment to M Street Estates of $225,000 on a note of D.C. Transit held by M Street Estates. Five days later, M Street Estates advanced $100,000 to D.C. Transit. The net result of these transactions was an outflow of cash from D.C. Transit to M Street Estates of $125,000, at a time when D.C. Transit's cash position was critical. No explanation was given in the record as to why this transaction took place. It is clear, though, that once again, despite the fact that transfers between separate corporations are involved, the ultimate control of these funds rested in the hands of those who control D.C. Transit. That control was exercised to remove cash sums from D.C. Transit and send them to another company in the corporate structure.

Neither of these latter two transactions, alone or together, would have made a sufficient change in the company's cash position to have solved the hundred bus purchase problem. We mention them, however, because

they do not live up to the company's responsibilities as an enterprise affected with a public interest. in the management of its cash working capital, the company's guiding principle must be the maximum protection of its ability to meet its obligations under its franchise, the Contract, and Commission orders. In the two instances discussed, the company in our view, departed from this guiding principle and we would be remiss if we did not point out its failure and direct its attention to its responsibilities.

Recent events indicate that the company is now more aware of its obligations and taking action to meet them. At the final session of the hearing, it was announced by the company's counsel that the company had obtained a loan of $1,000,000 secured by a mortgage on 3600 M Street, N.W., one of its non-operating properties. It has since been determined that the loan was made to a subsidiary of D.C. Transit in the amount of $1,500,000; of this amount, $1,000,000 was deposited to the credit of D.C. Transit on December 28, 1967; of this amount, $688,000 remained in the main working cash account of the company, and $312,000 was distributed among inactive bank accounts of the company.

Ever since we first became aware of D.C. Transit's critical cash position, we have engaged in discussions with the company about the problem and have urged them to raise the cash needed for transit operations through their non-operating properties, if no other sources are available. We are pleased that they have recognized their obligations in this regard and have acted for the benefit of the transit rider.

Returning now directly to the problem of depreciation, at the time D.C. Transit filed its Application No. 436, seeking relief from its obligation to purchase 100 new buses, we were, as stated earlier, faced with the fact that D.C. Transit did not, in fact, have sufficient

cash working capital to effect the purchase. We regarded the proposal to buy 45 used buses as undesirable and we undertook efforts, as referred to in preceding paragraphs, to have the company remedy its cash position, meanwhile deferring action on Application No. 436. In addition, we directed the company to purchase the twenty-five new buses which it stated it was in a position to purchase despite its cash problems. Those buses were in fact purchased and are now in service in the fleet.

On September 1, 1967, the company filed its rate increase application, in which it asked that its depreciation be based on a fourteen year life, rather than twelve years, and that its bus purchase requirement be reduced to eighty buses per year. Because the issues raised by this request were so intimately bound up with the issues raised by Application No. 436, we consolidated the two applications for purposes of hearing and decision.

At the hearing, D.C. Transit presented evidence supporting a change to a fourteen year life, urging that it would not affect standards of service to a significantly adverse degree. The Commission's Chief Engineer urged that we continue both the twelve year depreciation rate and the one hundred bus purchase requirement. However, the Commission's Chief Accountant prepared his financial exhibits on the basis of a fourteen year life (beginning June 1, 1967) so that they would be more directly comparable to the company's figures. However, he pointed out the inadvisability of a retroactive depreciation adjustment. He provided us with a calculation that using a twelve year life would increase depreciation expense and thus the amount which must be produced from the fare box, by approximately $500,000.

We must come to grips now with a fundamental question raised by the existing requirement that the company purchase one hundred new buses annually and

depreciate its fleet on a twelve year life. This requirement undoubtedly maintains the quality of the fleet at a very high level but it also imposes a financial burden upon the company, a burden which must ultimately be borne by the ratepayer. Specifically, in the future annual period, to remain with the existing program rather than go to a fourteen year life and a program of annual replacement of 1/14th of the fleet, the ratepayer will have to provide the company with about half a million dollars in additional revenue.

Maintaining a high standard of quality in the fleet of D.C. Transit is of great interest and concern to us, and we would be loath to take any action which would have a substantial adverse impact upon fleet quality. We do not believe, however, on the basis of the facts developed in this record, that an eighty-five bus purchase program and a fourteen year depreciation life would cause a substantial deterioration in fleet quality. It would, on the other hand, relieve the ratepayer of a considerable financial burden at a time when other burdens, particularly the labor costs of the company, are increasing significantly. Weighing all factors involved, we conclude that the wise course is to order a change in depreciation life from twelve to fourteen years and a change in the annual bus purchase program from one hundred new buses per year to eighty-five new buses per year. The projection for depreciation expense shown in the operating statement for the future annual period without a fare increase, supra, was based on calculations by the staff of the Commission working from the unrecovered cost of buses as of October 31, 1967, per company books; depreciation expense for the future annual period, for buses, was then calculated on a fourteen year service life basis with 4% of the original cost of each bus treated as residual salvage value. This treatment was accorded all new buses purchased since 1956; other rates

of depreciation, previously set by this Commission for minibuses, second-hand buses, and buses acquired prior to 1956, remained unchanged.

The decision to shift to a fourteen year life does not conclude our discussion of depreciation. Certain other adjustments are in dispute and must be dealt with. The staff proposed disallowance of $113,196 of the depreciation expense projected by the company. This amount is attributable to a projected loss on a proposed sale in the future of certain buses presently owned by the company. To allow this item, we would have to assume, first, that the company will sell these buses; and second, that the loss will be in the amount projected by the company. This is too highly speculative an item and has certainly not been established by the evidence presented by the company. We will disallow this expense.

The staff also suggested that we disallow depreciation expense of $55,288, attributable to depreciation on twenty over-the-road buses now owned by the company. The staff states that the company plans to sell these buses shortly and that depreciation on them should therefore be disallowed. The company agrees to part of this disallowance, namely $26,217, since it concedes that it has sold ten of these buses. It will not agree as to the remaining $29,071, however. We accept the company's contention. We do not think it proper to assume that all these buses will be sold in face of the company's representation to the contrary.

It was also suggested by the staff that we disallow an additional $77,720 of the company's projected depreciation expense. This is the amount of expense sought in the future annual period for depreciation on eighty new buses the company planned to purchase by June 1, 1968. The staff argues that because the company failed to purchase the one hundred buses allowed for in the last rate

case, we should not assume that the new bus purchases called for by this order will be made.

It is true that the company did not purchase one hundred buses, as allowed for in the last rate case and, as discussed below, we will make an appropriate adjustment to reflect that fact. It does not follow, however, that we should disallow the expense attributable to the new bus purchases this year. It seems a dubious course to disallow an expense on the assumption that a Commission order will not be complied with. Nor is it naive to assume compliance. The company has represented to us that the purchase will be made. Moreover, its cash working capital position has been improved as previously described so that the means for compliance exist.

We will, of course, take the steps which prudence dictates on the basis of our experience last year. Specifically, our order will require certain reports by the company to keep us informed of their actions in compliance with the bus purchase order. We will order the company to purchase 85 new buses, constituting approximately 1/14th of its current bus fleet; we will require the company to present proof to this Commission that a firm order for 85 new transit-type buses has been placed with a recognized supplier on or before February 1, 1968, at which time the company will be authorized to begin accruing for depreciation on its bus fleet (buses acquired since 1956) at the rate of 6.8571% per annum (14 year life less 4% residual). The placement of the bus order on February 1, 1968, will provide the usual four-month lead time for delivery of the buses so that they may be placed in service by June 1, 1968.

We will, therefore, allow as an expense in the future annual period the depreciation accrual on 85 new buses, beginning June 1, 1968, in the amount of $82,577.50.

One additional item relating to depreciation requires our attention. We have alluded several times previously

to the fact that in the last rate case our computation of revenue requirement contained, among other items, an amount of depreciation expense attributable to the projected purchase by D.C. Transit of one hundred buses in the year ending June 1, 1967. In fact, no buses were purchased in that period although twenty-five buses were ordered shortly after June 1 and were delivered in November, 1967. In the months since the fare increase, which was based in part on the assumption of a one hundred bus purchase, the company has earned at, or above the rate of return we authorized in that order. Hence, the ratepayer has provided the company with funds designed, in part, to provide an improvement in service which has not in fact materialized. We feel that an appropriate adjustment should be made to retain for the ratepayer the benefit he has bestowed upon the company.

In considering what kind of adjustment to make, we have been mindful of our growing interest, and that of the riding public, in effecting service improvements. We have recently directed D.C. Transit, as well as all other regular route carriers subject to our jurisdiction, to file reports with us which spell out steps designed to deal with certain specific service problems. We are very much aware that when the time comes for action on these problems, we will be faced with the fact that attempts at improvement may require activities involving expenses greater than the income they produce. In the past, this has been a deterrent to action by the company.

With these thoughts in mind, we see a beneficial means of recouping for the ratepayer the revenues paid in for depreciation expense on a bus purchase which never materialized. We will direct the company to establish a fund in the amount of $141,674. This sum represents depreciation on 100 new buses for the period

June 1, 1967 through December 31, 1967, less depreciation attributable to 25 new buses for the months of November and December 1967.

This reserve, or riders' fund, will be expended by the company, as the Commission directs, in such service improvement projects as the Commission deems appropriate. By this means, the rider will obtain service benefits for the revenues paid in for an assumed bus purchase which did not materialize. The benefits will not be those originally envisioned, *i.e.*, addition of new buses to the fleet. They will nonetheless be real benefits, perhaps even more helpful to the riding public.

The above action is to be reflected on the books of the company by concurrent charges, in the amount of $141,674 to "Special Escrow Fund" and "Surplus" accounts; concurrent contra-credits, in the same amount, will be made to one of the company's working "Cash" accounts, and to the "Reserve for Commission-Directed Projects."

The Return to be Allowed

We come now to what is perhaps the most important, and certainly the most complex, problem in the case, *i.e.*, the return to be allowed the company. A significant factor in our consideration of this question is the fact that we addressed ourselves in detail to the matter of rate of return just nine months ago in our Order Nos. 656 and 684, ruling on the last D.C. Transit rate case. We do not imply that our discussion there is dispositive of the issue in the present proceeding. We must decide the question here on the basis of the record now before us. Nevertheless, our statement therein of basic guiding principles continues to be valid and we will repeat it here.

For guidance on the applicable legal principles, we need to look generally to the decision of the Court of Appeals in *D. C. Transit System, Inc.*, v. *Washington Metropolitan Area Transit Commission*, 350 F.2d 753 (D.C. Cir. 1965) where the court discussed the rate of return question as it applies to D. C. Transit. The court ruled, first, that Transit is not entitled to a guaranteed return of 6.5%, as had been argued in that case.

The court went on to discuss, in detail, the factors to be taken into consideration in determining the proper rate of return. While we must make use of the operating ratio method in determining the rate of return, we must make inquiry into a number of factors. Our objective is to determine a just and reasonable rate, *i.e.*

> . . . one that assures that all the enterprise's legitimate expenses will be met, and that enables it to cover interest on its debt, pay dividends sufficient to continue to attract investors, and retain a sufficient surplus to permit it to finance down payments on new equipment and generally to provide both the form and substance of financial strength and stability. *D. C. Transit System, Inc.*, v. *WMATC, supra*, 350 F.2d at 778.

In making this determination, we must inquire into such matters

> . . . as the capital programs in prospect, what such programs entail in terms of down-payments as well as financing, the cost of borrowing money, working capital needs, the desirable ratio of debt to equity, the incentives required by a stockholder to keep his money in the business and the dividends and growth rates requisite to supply these incentives, the opportunities in these respects provided in comparable businesses, and

> /the/ related matters . . . *D. C. Transit System, Inc.* v. *WMATC, supra*, 350 F.2d at 779.

Moreover, we must not only make this inquiry but we must spell out our reasoning in some detail. Finally, we must bear in mind not only earnings on investments of comparable risk, but also particular facts and circumstances surrounding this company, such as its future equipment needs and their financial aspects, the company's peculiar capitalization, its earnings history, and its present risk situation in light of that history. In short, it is incumbent upon the Commission to undertake a thorough cost-of-capital study, as such studies have evolved in the regulatory field, in determining the return to be allowed to D. C. Transit.

We heard testimony in this proceeding from two witnesses on the subject of rate of return. The company called Mr. John F. Curtin of Simpson and Curtin, a transportation consultant with long and distinguished experience in the field. The staff presented testimony by Mr. David A. Kosh, a utilities expert and rate of return analyst who also brought to us the benefit of a long and distinguished career in the field. We shall begin with a brief description and summary of the testimony presented by each of these witnesses.

Mr. Curtin's Testimony

Mr. John F. Curtin presented testimony and exhibits reflecting his determination of the fair return to be allowed the company. Mr. Curtin stated it was his opinion that the determination of a fair rate of return requires consideration of the amount needed by the company to safeguard its service, to attract capital and to provide sufficient income, over and above operating expenses, to insure the financial soundness of the company, after

giving due consideration to the inherent differences between the transit industry and other businesses, including other utilities as well as other industries generally.

He enumerated seven economic factors by which the transit industry may be distinguished from other industries. In his opinion they represent risk factors over and above those in other industries which make Transit's securities more speculative. It was Mr. Curtin's opinion that this company is a typical transit utility with operating characteristics similar to transit systems throughout the United States; the similarity embraced such factors as the trend of its patronage, the population of its service area, and in the relative degree of use of transit within the community.

Mr. Curtin presented tabulations showing the operating ratios of public utilities in the Washington area for a period of 12 years, of railroad companies throughout the United States for a similar period, and of a group of privately owned transit systems over a two year period, which, in his opinion, were a representative group. Mr. Curtin compared the growth of the utilities in the Washington area with the growth of the company and concluded that D. C. Transit does not have the same growth characteristics as the other local utilities; accordingly, he concluded that the transit company was not able to absorb the rising costs due to the areawide inflationary pressures.

Mr. Curtin also discussed the risks inherent in the transit business from the long-term viewpoint, and discussed the long-term growth of public utilities. This witness recognized that the company's passenger volume trend has actually increased in the past few years. However, he classified this as a minor change and contrasted it with what he noted was a strong growth trend existing among other major utilities of the metropolitan area.

The witness also made a comparative analysis of the quality of public utility bonds and notes, comparing Transit with other utilities. Mr. Curtin also presented a comparative analysis of the company with other transit systems insofar as their basic market characteristics were concerned. He concluded that Washington is reasonably representative of the major metropolitan areas in this country, both in terms of city and urban population density.

The witness presented a comparative analysis of operating revenues, operating costs, wages and salaries, and miles of service for the company in the years 1961 through 1966.

Mr. Curtin recommended that this company should earn a return, as a minimum, in the amount of $2,600,000 annually. In arriving at this conclusion, the witness commingled what is known as the "comparable earnings" standard and the "attraction of capital" standard. To this end, Mr. Curtin presented the capitalization of various public utility groups in 1966, including electric, gas, telephone, water and transit. He tabulated the comparative price of debt capital among those public utility groups, again in 1966, and then gave his analysis of the tabulation. Correspondingly, he presented a comparison and analysis of the price of equity capital among that same group for the same year. That was followed by a comparison of the price of debt and equity capital among the same group, which was followed by a synopsis of the total return on capital, on a comparable basis for the same groups of utilities. Mr. Curtin concluded from this analysis that whereas the money market was willing to invest in other utilities which return yields between 5.7% and 7%, investors in the transit industry required a return of 10.1%. In arriving at his conclusion that Transit should be permitted a return of 2.6 million dollars annually, his recommendation was based on three general

factors: (1) rate of return; (2) operating ratio; (3) adequate coverage on the existing and anticipated debt.

In deriving a rate of return of 9-½ to 10%, Mr. Curtin took the average return on market valuation of all securities for his group of 12 transit companies. He computed that this return was 10.1% (Table X). However, since D. C. Transit stock is held exclusively by a parent company, there is no market appraisal available for the system. Mr. Curtin took the view, however, that since the risks borne by D. C. Transit is comparable to that of other large city operations – i.e., the 12 transit companies considered in deriving the average return on market valuation, a similar return should be afforded D. C. Transit. In the absence of a current appraisal or market valuation of the securities of the company, Mr. Curtin related the return of 10% to Transit's weighted average rate base, which he computed to be $27,162,727. The $2,600,000 recommended return equates to 9.57% of that rate base. In this witness's opinion, this is a minimum return because he felt a market appraisal of the property would reflect a value higher than his stated weighted rate base.

Mr. Curtin then derived what in his opinion was a proper operating ratio for the company. He concluded that the short term risk exposure of the company required an operating ratio in the range of 92.0% to 92.5%. That operating ratio was a judgment figure arrived at by weighting various factors, including the attraction of capital, the vicissitudes of the transit business, and a comparison of the operating ratio of D. C. Transit with that of local electric, gas, and telephone companies. He noted that the recommended return for the company under the operating ratio method was considerably less than the margin which other utilities in the metropolitan area normally enjoy.

He concluded that a return of 7.5% to 8.0% on anticipated revenues of $39,767,548 would produce a margin between $2,982,600 and $3,181,400. However, the recommended return of $2,600,000 was equated by him to 6.54% of operating revenues.

The third consideration advanced by the witness to support his recommended return was an analysis of the debt requirements of the company and the need to provide adequate coverage thereof.

The witness testified that the aggregate outstanding debt on May 31, 1967, amounted to $21,838,205. The weighted average interest rate on this debt at that time was 5.95%. Moreover, the witness contended that the cost of debt money has been rising for the company, noting that recent financing has required interest rates of 6-½ to 7%.

Finally, the witness stated that the return would provide a return on equity capital of $1,366,200, or a 32.29% return on the book equity value of the company. He indicated, however, that the percent return based on book value equity has no significance because, in his opinion, the book value equity of the company bears no meaningful relationship to the market value of the company. Accordingly, the actual return on *market* value equity would be at a rate less than 32%.

Testimony of David A. Kosh

Pursuant to our directive, the staff engaged an independent expert in the field of rate of return. Mr. David A. Kosh, of the firm of Kosh, Glassman Associates, public utility consultants, presented testimony and exhibits reflecting his opinion as to the return to be allowed the company in this proceeding.

Mr. Kosh approached his problem from two points of view – the classic rate of return on rate base, and the operating ratio. In laying the foundation for his recom-

mendations, Mr. Kosh noted that prices in general were set by the forces of price competition; where businesses vested with the public interest exist without competition, the substitute for competition is regulation. He noted, however, that regulation must make it possible for the utility to compete in the capital markets for the funds it needs. The utility's earnings, both historical and prospective, must be sufficient to maintain existing capital and attract the required additional capital on reasonable terms. Mr. Kosh concluded that the fair return should be identified with the price a utility must pay, that is, the earnings it must hold out to attract capital. He concluded that the basic ingredient of a fair rate of return is the cost of capital. He declared that the cost of capital is determined by considering the pure rate of interest and the compensation for subjecting one's capital to uncertainty, i.e., the degree of risk.

Mr. Kosh stated that where a company's securities are actively traded, the terms on which it is traded provide evidence of the cost of that particular type of capital to that company; accordingly, the yields of a company's bonds reflect cost of debt, and the earnings/price ratios indicate the cost of equity.

In effect, Mr. Kosh stated that the fair rate of return is basically equal to the cost of capital, and that the cost of capital is determined in the investment markets. Contrary to the position taken by Mr. Curtin, Mr. Kosh declared that the capital structure of a company affects both the cost of debt and the cost of equity.

Since the securities of D. C. Transit are not traded, Mr. Kosh obtained evidence as to the cost of capital to D. C. Transit by relying upon an analysis of a group of transit companies whose securities were traded and, in his opinion, very similar to Transit.

Mr. Kosh then developed his second approach, that is a determination of the operating ratio or revenue mar-

gin. He explained that the operating ratio is the ratio of all expenses, including depreciation and all taxes, to revenue. The reciprocal of that ratio equals the margin of return or revenue margin. It is Mr. Kosh's opinion that it is improper to compare the operating ratios of non-transit industries with the transit industry. He noted that the so-called standard utilities require a heavier investment per dollar of revenue than do transit companies. Accordingly, the margin between revenues and expenses is much greater than it is for transit companies. It is the greater variability of earnings, combined with low-profit margin, stated the witness, which makes the revenue margin a matter of much greater import in the transportation utilities than in the standard utilities. Mr. Kosh concluded that the equity holder in transit companies then is much more concerned with the fluctuations in revenue margin than in the return on investment. In seeking to determine the capital requirements of a transit company then, the regulator should seek a relationship for the transit industry against which it could measure the fluctuations in earnings of a given company.

After laying down those general rules, Mr. Kosh attempted to measure the cost of equity in general. He did so by determining earnings/price ratios for a general group of utilities, over an extended period of years. Mr. Kosh stated that an evaluation of earnings/price ratios must be made over an extended period of time during which abnormal short run pressures tend to balance out. In his opinion, the years 1958 to 1966 provided such a period. He noted that because the stock of D. C. Transit was not traded he was unable to determine earnings/price ratios for that company. Therefore, in order to get a base for his estimate of the cost of equity to D. C. Transit, he selected a group of transit companies which he felt were representative of the industry and comparable

to D. C. Transit at the same time. He also explained the basis for eliminating certain companies. For example, he stated he had eliminated all holding companies, all interstate long haul companies, and all wholly owned subsidiaries which had no stock traded. He also eliminated companies with a relatively small number of stockholders and also those companies that did not pay dividends during each year of the period 1958 to 1966 inclusive. After selecting nine companies, he developed comparisons among them and with Transit, noting their general operating characteristics, density of population, employees per bus, and revenue passengers per bus per day.

He further presented a summary of his analysis of the nine-company transit group and applicant herein, showing for each its operating ratio, revenue margin, and the standard deviation of the margin (that is, a measure of the scatter or dispersion of the individual annual values around the average). Also, he showed the net plant turnover, the rate earned on net plant, the average earnings/price ratio, the dividend payout ratio, the equity ratio, and the ratio of market price of the stock to its book value. Mr. Kosh stated that it was his opinion that the nine companies he selected reflect an investment opportunity similar to that of D. C. Transit, if the companies are considered as a group and not on an individual basis.

Mr. Kosh then made a study to determine to what extent the earnings/price ratios reacted to different degrees of fluctuations in the revenue margin. He did this to test the hypothesis that investors would require a higher return, for transit companies whose revenue margins or earnings fluctuated greatly than for those whose revenue margins were more stable. The test was made by developing an index or measure of variability by establishing a ratio of the standard deviation divided by

the average revenue margin. (Exh. 42, pp. 7-9). His test revealed that the computed earnings/price ratio was 12.62%. Having established a 13% return on equity based on the above earnings/price ratio analysis, the witness increased the cost of equity to 15%, based on an additional allowance for the cost of financing and other factors involved in raising equity capital. The witness then developed D. C. Transit's cost of debt, which, based on his analysis, was 5.98% as of December 31, 1966, and which would be increased in 1967. The witness stated that the cost of anticipated new debt would be 7.5%; accordingly, the cost of debt to the company as of December 31, 1967, would average out to 6.32%.

Having derived the cost of debt and the cost of equity, the witness developed two capital structures. The first was the actual capital structure as of December 31, 1966, and the second was a pro forma capital structure as of December 31, 1967. He noted that the actual capital structure as of December 31, 1966, consisted of 87% debt at a cost of 5.98% and 13% common equity, for which he used a cost of 15%. The total cost of capital for the actual period was 7.15%. Using the pro forma capital structure, he established debt at 86% at a cost of 6.32%. He then derived 14% of common equity at a cost of 15%. As a total cost, he computed the figure of 7.54%. These two percentages he stated were the cost of capital. Based on those costs, it was his opinion that a fair rate of return on rate base for the company at this time was 7-¾%.

Mr. Kosh's approach to forming an opinion as to the proper earnings to be allowed under the operating ratio method was derived through an analysis of the variability or fluctuations of the revenue margin of Transit as well as the group of the nine transit companies previously discussed. Mr. Kosh found that the average mar-

gin for the group of transit companies was 4.12%. The standard deviation developed was 1.16%.

A parallel computation for D. C. Transit was derived and showed an average revenue margin for the nine year period of 4.15% with a standard deviation of 1.18%. Mr. Kosh then related that had the company earned a revenue margin of 4.15% (its 1958-1966 average) in 1966, its revenue margin would have been $1,434,000. At the end of 1966, interest requirements were $1,294,000; earnings thereby covered interest 1.1 times, which Mr. Kosh considered barely sufficient.

He noted, however, that there is a 1 in 3 chance that earnings would decline to a 2.97% revenue margin, that is, a deduction by one standard deviation of 1.18%. At this level earnings would clearly be insufficient. Mr. Kosh then recommended that Transit be allowed a revenue margin of one standard deviation above its average, that is a margin of 5.3%. Such a margin, he stated, provides a sufficient safety factor against chance occurrences.

We have, then, on the one hand, a recommendation by Mr. Curtin that we allow the company a rate of return on gross operating revenues of 6.54%, or, in dollar terms, a return of $2,600,000 annually. We will address ourselves, first, to whether we can accept this recommendation.

Mr. Curtin's recommendation was, as any rate of return determination must be, an expression of his best judgment as to the return required by the company. He based this judgment upon an analysis of certain data he presented to the Commission – an analysis which was, in essence, the comparable earnings approach to rate of return determination. He further supported his judgment by an analysis of the return he recommended in terms of the criteria set out by the court of appeals in *D. C. Transit* v. *WMATC, supra,* p. 25.

We are not persuaded by Mr. Curtin's reasoning, however. He first presented us with a comparison of data relating to D. C. Transit and certain other transit companies with other data relating to certain groups of companies from traditional utility fields such as gas, electric and telephone. These data covered both operating ratio and return on market valuation of capital. He concluded that the transit industry data differed significantly from data as to other utility industries, a fact which we do not doubt but which gives us little specific guidance as to the significance of the data concerning other industries, or as to the return which should be allowed to D. C. Transit. He further contended that the risk borne by D. C. Transit was comparable to that of other large-city transit operations. This conclusion was based on the broadest of data and not on any detailed analysis as to the comparability with D. C. Transit of the specific companies concerning which he presented information.

More significantly, in reaching this conclusion, there was no discussion of certain particular facts concerning D. C. Transit which, as we have previously stated in Order No. 656, should be considered in assessing risk. To repeat again our language there, we are interested in Transit's position in a complex corporate structure. It is a subsidiary of an enterprise having a variety of activities. The parent company, in turn, has a number of subsidiaries engaged in non-transit activities such as real estate and broadcasting. We are fully aware that what we are regulating is the company's transit operation and, in mentioning these other factors, we do not assert any jurisdiction or control over them. However, we are not considering the abstract question of what return should be allowed to a theoretical transit operation. We are trying to determine the return to be allowed to Transit. This requires an assessment of the cost of capital to this

particular company, and that cost, from the viewpoint of an investor, would be determined not merely by the risk involved in the transit operation, but by the overall prospects of the company in all its endeavors. Further in this connection, we are given no help on how the risk factor for Transit is affected by future prospects for development of real estate still held by Transit but which might be developed in other ways. We are not asserting that such prospects exist but we are interested in evidence or discussion of the question. Finally, we find nothing on how the risk factor and, therefore, the cost of capital, is affected by the company's past financial history.

In any event, Mr. Curtin eventually sets forth the conclusion that in 1966 the return on market valuation of the capital of his group of 12 transit companies is 10.1%. This is, of course, an average. Turning then to D. C. Transit, he points out that his recommended return of $2,600,000 is equal to 9.57% of the company's historical cost rate base. He pointed out this percentage relationship because he has no figure for D. C. Transit directly comparable to the market valuation of capital used for his other companies since D. C. Transit's stock is not traded. We expressed our concern that Mr. Curtin was not comparing likes with likes, and, at our request, Mr. Curtin subsequently supplied the 1966 return on historical cost rate base for each of the twelve companies he used for comparison. Examination of that data shows that 6 of the companies had a return on historical cost rate base lower than that he recommends for D. C. Transit. Moreover, one of the six companies with a higher return than his recommended level was Cincinnati Transit Company. It was revealed on the record that this company's net income in 1966 was distorted to an unusually high level by a non-recurring income from profit on the sale of securities. This not only renders its

1966 return of no value for comparison, it distorts the entire average. Further, this fact illustrates the danger of relying upon data as to a single year in reaching conclusions on return. In short, we find little to rely on in the data he presented to justify a conclusion that a return on rate base in the neighborhood of 10% is proper.

Mr. Curtin also analyzed his recommended return in terms of operating ratio. He opined that a return of 7.5% to 8% on gross operating revenues (*i.e.,* an operating ratio of 92% to 92.5%) was appropriate. It was rather vague as to how Mr. Curtin arrived at this conclusion. In stating it, he did not compare this figure with data for other companies, as he had done in discussing return on market valuation of capital and return on rate base. At our request, however, Mr. Curtin supplied the operating ratios experience in the seven years from 1960 to 1966 by the twelve transit companies he used for comparative purposes. This gave us a total of eighty-four separate instances of operating ratio experiences. It is interesting to note that only in seven out of these eighty-four instances was an operating ratio as low as that recommended by Mr. Curtin experienced. No company listed experienced a consistent pattern of operating ratio at the level urged by Mr. Curtin.

Apparently, Mr. Curtin himself did not feel strongly that a return of 7.5% to 8% on gross operating revenues could be justified since the dollar return he actually recommends amounts only to 6.5% of those revenues.

Again we note that, of the eighty-four instances of operating ratio experience supplied by Mr. Curtin at our request, only fourteen were at or higher than a 6.5% return. Only one of the twelve companies consistently obtained such returns. We feel that neither Mr. Curtin's data, nor his reasoning, concerning operating ratio justify the conclusion he recommends.

Mr. Curtin also discussed his suggested return in terms of coverage of debt service. It was his position that debt service, whatever its level, should be covered two times by the authorized return. He cited no experience to justify this conclusion. Nor did he think its application to D. C. Transit should be examined in light of the fact that D. C. Transit's debt-equity structure at May 31, 1967 – 89% long-term debt and 11% equity (Company Exhibit No. 1) – was almost precisely the opposite of the typical experience in the transit industry. We simply cannot accept the principle that, whatever the level of debt service imposed upon the company by its management, the return allowed should be twice that amount. This is simply another way of saying that, no matter what the equity investment, the equity holder should receive a return in dollars equal to the amount paid for debt service. We feel that a more cogent analysis on the subject of debt service coverage is needed. We cannot accept Mr. Curtin's reasoning or conclusion.

Finally, Mr. Curtin analyses his recommended return in light of the factors set forth by the court of appeals in its discussion of return in *D. C. Transit System Inc.* v. *Washington Metropolitan Area Transit Commission,* 350 F.2d 753 (D.C. Cir. 1965). The elements referred by the court are (1) legitimate expenses; (2) interest on debt; (3) sufficient dividends; (4) sufficient surplus for needed down payments and financial stability. Mr. Curtin breaks down his recommended return as follows:

(1) Interest on debt	$1,233,800
(2) Dividends on stock	500,000
(3) Down payments on new buses	354,600
(4) Balance of return on equity as retained earnings	511,600
Total	$2,600,000

This breakdown, says Mr. Curtin, demonstrates that the standards set forth by the court of appeals are met by his recommendation. We do not agree.

We have no problem with the interest element; the amount of interest to be incurred must be covered by the return. However, Company Exhibit No. 33 shows an interest forecast of $1,244,458. This forecast includes interest on the projected purchase of 80 buses in 1968. Errors in this Exhibit were corrected in Staff Exhibit S-30 which developed a projected interest cost of $1,162,490 for the future annual period. This latter figure failed to include a provision for interest on the financing of new buses in 1968. So the amount of $70,453 should be added to provide 6-½% financing on 85 buses, assuming a 10% down payment. This brings the total interest forecast to $1,232,943. This total is higher than it might otherwise be because it includes interest on 16 short-term notes created by the cash shortage mentioned supra; the interest on these latter notes total some $180,000.

Mr. Curtin then postulates that $500,000 must be allowed in the return element for dividends. He bases this assumption on investor expectation based on past experience. In essence, he says, the $500,000 dividend paid in the past must be continued. This reasoning ignores the fact that no dividends have been paid since July, 1966, and that investor expectations cannot be assumed to be unchanged. Moreover, Mr. Curtin agreed with us on cross-examination that, if we concluded that the amount of dividends allowed for in the past was no longer appropriate, we were free to change that allowance.

We considered the question of dividends just nine months ago in our Order No. 684 and our discussion

there, which is still pertinent and still represents our view, will be repeated in pertinent part here. We do not consider it our province to dictate the amount of dividends which should be paid. Rather, we should permit a return which will allow the management of the company to pay a sufficient dividend to compete in the capital markets. We do not anticipate that the entire amount of net cash flow would be used for dividends, however, because of the company's recent cash history.

We anticipate, therefore, that dividends, if declared, will be at a level significantly lower than in some past years. We do not regard this as requiring a larger return. The substantial risks the company faced in coming into this community at a difficult time and converting to an all-bus operation with a high standard of service may well have dictated a high return of capital in past years. As we look at the company now, however, it faces a more secure future than most transit companies, having a modest but definite growth potential.

We have problems with the remaining two items in Mr. Curtin's breakdown. First, we believe that the separation he makes between down payments and retained earnings is questionable. Down payments on buses are a cash requirement which comes out of the cash flow of the company. They are not credited against surplus, nor do they affect the "surplus" or "retained earnings" in any way. In reality, Mr. Curtin's two items should be added together and amount to a recommendation that we should allow a growth in retained earnings of $866,000 annually, after dividends of $500,000. Based on the company's retained earnings at the end of the historical period in the amount of $2,261,544, the addition to retained earnings, before dividends, *i.e.*, $1,366,000 represents a growth rate for retained earnings of 60%. Assuming a dividend payout in the amount allowed for by Mr. Curtin, the actual amount retained in surplus

would be $866,000, representing a growth rate of 38%. As we stated in Order No. 684, we believe we should allow for growth in retained earnings, but the rate recommended by Mr. Curtin is, in our judgment, immoderate.

We might add that, while the growth in retained earnings should be related in some measure to the need for additional capital expenditures in the business, we do not feel that all additional equity capital requirements should be furnished through retained earnings. This, however, is the assumption underlying Mr. Curtin's contention that the entire down payment requirement for new buses should be allowed for in the return element. Certainly, some capital growth should be internally generated, but we do not need to protect the equity holder from the need to produce additional equity capital from outside sources.

In sum, therefore, we do not believe that the company has established a need for a 6.5% return on gross operating revenues. We are not convinced, either by Mr. Curtin's reasoning or by his supporting data, that this is the level required by application of the comparable earnings test. We do not think his analysis of the dollar amount he recommends in terms of the criteria established by the United States Court of Appeals for the District of Columbia Circuit stands up to scrutiny. We note with disfavor that he has not discussed or taken into account such factors as D. C. Transit's place in a larger corporate structure, its prospects for development of real estate it holds, and its past financial history. For all these reasons, we will not accept Mr. Curtin's recommendation.

Mr. Kosh based his recommendations as to return on a rational and analytical approach to certain basic data concerning both D. C. Transit and other companies, both within the transit industry and in other fields of

endeavor. Mr. Kosh approached the problem from two distinct bases. First, he presented an analysis which was essentially a combination of the traditional cost of capital approach to rate of return determination and the comparable earnings approach. In essence, Mr. Kosh undertook to determine the cost of capital to D. C. Transit. While it was possible to make a direct determination of the cost of debt, no such direct approach was possible in the case of the cost of equity. The usual method employed in such determination, at least where market value and book value of equity securities are substantially the same, is to analyze the earnings price ratios. This was not possible in the case of D. C. Transit because the stock of the company is not publicly traded. To overcome this difficulty Mr. Kosh analyzed the earnings price ratios of a group of nine transit companies, which, in his opinion, were comparable to D. C. Transit. He supported this conclusion as to comparability by presenting data concerning the general operating characteristics of each company. The conclusion was that these companies as a group represented an investment opportunity similar to that of D. C. Transit. He then pointed out that the average earnings price ratio for the group was 13.31%.

To further test his analysis of cost of equity capital to D. C. Transit, Mr. Kosh used a second approach. Mr. Kosh attempted to establish a relationship between the earnings price ratio required by investors and the fluctuations in revenue margin, *i.e.*, operating ratio experience of a given company. He plotted the results for the nine companies on a graph which established a relationship between fluctuations in revenue margin and earnings price ratios. He then computed the fluctuations in revenue margin experienced by D. C. Transit and placed this on the curve developed for the other companies to determine what earnings price ratio was indicated. The

answer was 12.65%, a figure substantially similar to the conclusion reached by the method previously described.

On the basis of both these analyses Mr. Kosh concluded preliminarily that the cost of equity capital to D. C. Transit was 13%. In a final adjustment, he increased this figure to a 15% cost of equity. This adjustment was designed to reflect the downward pressure on the market price of stock which would be involved in a new issue thereof and which would therefore increase the earnings price ratio required.

Mr. Kosh then computed the company's cost of debt capital to be 6.32%. Mr. Kosh applied these figures both to the actual capital structure of D. C. Transit and to a pro forma debt structure based on a financial program he himself proposed. The total cost of capital based on the actual debt structure was 7.15%. On the pro forma structure the cost of capital was 7.54%. On the basis of all these figures Mr. Kosh concluded that the return on rate base required by D. C. Transit is 7.75%.

Mr. Kosh then turned to an analysis of the return requirement in terms of operating ratio. His analysis was one which he himself admitted was novel in rate proceedings. He examined the operating ratios experienced by D. C. Transit, and by the same group of nine transit companies referred to previously, over a nine year period. He studied the fluctuations in return experienced by D. C. Transit and the other companies and determined the standard deviation by each company. He found that the average return on revenues for the group was 4.12% and that the standard deviation experienced by the group was 1.16%. For D. C. Transit he determined that the average return on revenue for the nine year period was 4.15% with a standard deviation of 1.18%. According to statistical theory the chances are two out of three that in a given year D. C. Transit will experience a return in the range between 2.97% and

5.33%, *i.e.*, within one standard deviation on either side of the 4.15% average. Mr. Kosh's examination of the interest requirements reveals that a return of 2.97% would not produce enough earnings to cover the interest requirement and, as Mr. Kosh points out, this is obviously inadequate. Hence, Mr. Kosh recommends a rate of 5.33%. In other words, he would recommend a return one standard deviation above the average experienced in the eight year period. This would mean, again according to statistical theory, that the chances are two out of three that in any given year the company would experience a return not lower than 4.15% and not higher than 6.51%. In one out of three instances the return would fall outside this range but whether on the high or the low side cannot be predicted.

It is interesting to note that according to the statistical theory spelled out by Mr. Kosh, the chances are that in two out of three years the company would have the opportunity to earn as high as 6.5%. This is of interest in light of the language of Section 4 of D. C. Transit's franchise and Article 12, Section 6(a)4 of the Compact. On the basis of this method of analysis Mr. Kosh recommended a return on gross operating revenue for D. C. Transit of 5.3%.

We find his approach interesting. It is, beyond question, a reasoned and rational attempt at analysis of certain data designed to form a basis for a judgment as to proper return to be allowed. We are not unaware, however that the approach does have flaws. For one thing, it is somewhat too abstract to be fully acceptable. For instance, in essence, Mr. Kosh concerned himself only with a *rate* of return. He made no recommendation as to a dollar amount of return and this seems to us to be an essential element to the rate of return determination. Moreover, because he did not address himself to the question of a dollar return, Mr. Kosh did not provide, at

least as part of his presentation in chief, an analysis of the return recommended in light of the criteria set forth by the United States Court of Appeals for the District of Columbia Circuit in its 1965 *D. C. Transit* decision. On oral examination, Mr. Kosh did address himself to this question, and he concluded that a return at the level he recommends would meet the Court's criteria.

Finally, we consider it a flaw that Mr. Kosh's analysis did not take into account those facts and circumstances peculiar to D. C. Transit such as its past financial history, its position in a complex corporate structure, and the development value of its real estate. As we stated in discussing Mr. Curtin's testimony, we feel that these are factors which must be considered, if not by rate of return witnesses, by the Commission itself in making its decision.

While we recognize these flaws in Mr. Kosh's analysis, it does not follow that the figure he recommends must be rejected. Mr. Kosh aimed his major thrust at an exceedingly critical area in regulation-by-operating-ratio. Quoting from the decision of the United States Court of Appeals for the District of Columbia Circuit (Case Numbers 17,953 and 17,954, decided April 8, 1965), the Court, on page 9, was discussing the reason for reliance upon the operating ratio method of ratemaking in the case of motor carriers, and stated: "The principal risk in such operations inheres in the cost of operation, not in the investment." Mr. Kosh attempted to quantify this risk as pinpointed by the Court. By studying the behavior of operating ratios, or its reciprocal – margin on gross revenues – Mr. Kosh was able to provide an empirical formula as a basis for the exercise of judgment as to what constitutes a fair and proper rate of return on gross operating revenues.

We have computed the return called for by a conclusion that a 5.33% return on gross operating revenues is

fair and proper. That return would amount to about $2,000,000. Analysis of such an allowance indicates that it is fair and reasonable to the company. In these circumstances it is proper for us to adopt this end result. *F.P.C.* v. *Hope Natural Gas Company,* 320 U.S. 591, 602 (1944).

In terms of return on system rate base, a net operating income of about $2,000,000 will represent a return of about 7.4%. We have not concerned ourselves too much with an exact rate base because, in the case of this applicant, this is not a sensitive figure. The rate base relied upon by Mr. Curtin for the company was $27,162,727, a projected rate base; this was very close to the historical average rate base developed by the staff in Exhibit S-43, as of October 31, 1967, in the amount of $27,160,779. In each instance, $2,000,000 would represent a return of 7.363%. On the other hand, if the staff's figures were projected to October 31, 1968, providing for the purchase of 85 new buses and the accumulation of depreciation, the average rate base for the 12 month period ended October 31, 1968, would stand at $26,725,442, against which a return of $2,000,000 would represent a return of 7.483%.

The net operating income of about $2,000,000, when related to capitalization of D. C. Transit as of May 31, 1967 equals 8.04% (on long-term debt and stockholder's equity per Staff Exhibit S-19); and the net income available to the equity holders (after interest) is 26.4% of equity as of May 31, 1967 (Staff Exhibit S-19). This return will allow debt service coverage of 1.62 times. We are not allowing interest requirements to be covered two times as suggested by Mr. Curtin, but only 1.6 times. As we stated in discussing Mr. Curtin's testimony, we think the suggested factor of two, for coverage of interest, is excessive in light of the company's capital structure. The coverage we have allowed does not unduly burden

the ratepayer and yet amply protects the company's ability to service its debt.

We have measured our tentative operating margin of 5.33% against the margins experienced by the companies studied by the two consultants in this case. Mr. Curtin's 12 companies (Exhibit 28H) showed, after converting his operating ratio figures, that the return on gross operating revenues for the one year studied by Mr. Curtin (1966), ranged from 2.94% to 8.17%; he did not develop an overall average. Mr. Kosh, on the other hand, presented the picture of 9 companies, giving effect to their experience over the years 1958 through 1966 (Exhibit S-42). The range for these companies was 2.27% to 6.35%, with the arithmetic average being 4.12%. The same exhibit showed an average rate of return on net plant of 7.94%, with a range of 3.49% to 11.62%. Mr. Curtin's return on rate base study appeared on Exhibit 28G, and developed an average of 12.37%, with the range beginning at 5.30% and reaching a high of 30.50%. As noted in the record, and previously in this order, the rate of 30.50%, when adjusted for a non-recurring profit on sale of securities, became 7.5%.

The return of approximately $2,000,000, considered in this case as fair, fits comfortably within the parameters set in the exhibits presented by the consultants, equating to 5.3% or 5.4% of gross operating revenues and about 7.4% on average rate base.

We have considered the return allowed in light of the criteria spelled out by the court of appeals. From the $2,000,000 allowed, $1,232,943 will be paid out in interest. This leaves approximately $767,000 to be returned to the equity holder. We must consider whether this is adequate to "pay dividends sufficient to attract investors, and retain a sufficient surplus to permit it to finance new equipment and generally to provide both the form and substance of financial strength and stability."

D. C. Transit System, Inc. v. *Washington Metropolitan Area Transit Commission,* 350 F.2d 753 (D. C. Cir. 1965). We think this requirement is satisfied. A return to equity of this magnitude should permit some payment of dividends, albeit perhaps not at the level experienced by the company in prior years, particularly, in light of the company's need for cash working capital. We do not intend to dictate the amount of dividends to be paid since that is the province of management. However, as previously pointed out, we are not disturbed by the fact that dividends may be lower than past years since we feel that the company faces a more secure future now than it did in the early years when it was coming into the community and converting to an all-bus operation. The amount we allow will provide the equity holders with a rate of return on the book value of equity capital of about 26.4%. We do not regard this as excessive in light of the risks borne by the equity holders and the capital structure of the company.

We cannot predict what growth rate in retained earnings will be experienced since we do not attempt to dictate the amount of dividends to be paid. However, we note that the maximum growth rate in retained earnings, if no dividends are paid, will be 32%. We feel that this permits the growth in retained earnings which is essential for any financially healthy company.

We have also considered both the dollar amount of the return and the rate of return we allow here in the light of our determinations in the last rate case, decided just nine months ago. There, we allowed a rate of return of 5.24%, slightly under the allowance we have determined upon here. We think that this slight increase is justified by general economic developments of which we take note, such as a general increase in the cost of debt capital over the past year. The dollar amount of return we allow here is generally consistent with that allowed

in the past rate case, as we feel it should be in light of the proximity of the cases to one another in time.

To sum up on the question of return, it is our judgment, on the basis of the record in this proceeding, that the company must be allowed a net operating income of about $2,000,000. This dollar return is based upon a rate of return on gross operating revenues of 5.33%. While this was the figure recommended by the staff witness, we did not adopt it simply because we accept his reasoning. Rather, we have tested the return called for by application of this amount and find that in light of the risks faced by the company, the experience of other transit companies, and the financial requirements of the company, the return allowed seems fair and reasonable. We are unable to accept the recommendation of the company's witness. We feel that neither the data he presented nor the analysis he made of it justified a return of the level he suggests. The return we here allow, in our judgment, meets the standards by which a reasonable return is to be determined.

The contention was raised in this case, as it has been raised repeatedly in the past, that the equity owners of this company have been unjustly enriched at the expense of the ratepayer. This is a contention which has received our careful attention on many occasions. At our direction, the staff has placed detailed data in the record, not only in this case but in past rate cases, as to the financial history of this company and the returns it has produced for its owners. We do not propose at this juncture to engage in a detailed discussion of past history nor to treat analyses of that history which are certainly subject to argument. We think it might be appropriate to point out, however, that of the $338,391,456 of gross operating revenues which have been paid into the company since its present ownership assumed control on August 15, 1956, $13,271,341 has flowed through to the equity

holders in the form of net operating income, a margin, or return, on gross operating revenues of 3.92%. After deducting interest payments during this period of time, in the total sum of $7,246,687, the return on gross operating revenues flowing onto the equity holders was 1.78%. Hence, whatever the merits of the arguments on the degree to which the owners have profited, it seems clear that the public has not been unduly burdened.

In the context of our obligations in this proceeding, these arguments of past history are unavailing. We mention them only because a proposal was made in this proceeding that we should, on the basis of this past history, roll fares back to the level at which they were in 1956. We have considered the arguments made along these lines very carefully and seriously. Our obligation, clearly fixed by law, is to establish a rate structure which will produce revenue sufficient to cover the company's expenses and provide it with a fair return.

> "Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary." *Bluefield Water Works and Improvement Co.* v. *West Virginia Public Service Commission,* 262 U.S. 679,690 (1923).

Not a shred of evidence was produced to support a conclusion that the rollback suggested would achieve this result and it flies in the face of common sense to think that it would. Rather than becoming mired in these fruitless arguments over the past, we have faced up to what is our real task in this proceeding. We have rigorously examined the company's expenses to be sure that only

those both justifiable and predictable are allowed. We have long and carefully considered the return which should be allowed the company and have reached a figure which, we are convinced, is fair both to the company and to the ratepayer.

We have previously determined that the present fares will produce a net operating income in the future annual period of $1,544,246, after taxes; this is an operating ratio of 95.82%, or a margin of return of 4.18%. See Table I, p. 6.

We have further found that the company is entitled to a revenue margin of about 5.33%, or a net operating income of approximately $2,000,000. Accordingly, it stands that the existing fares are unjust and unreasonable, in that they will not produce revenues sufficient to enable the company to meet its expenses and earn a reasonable return.

Return Projected Under Fares Proposed by the Applicant

Having found that the present fares are not fair and reasonable, we turn to a consideration of the company's proposed fares.

The company originally predicted that its proposed fares would generate $39,792,162 in gross revenues, which, after application of estimated operating revenue deductions, would produce $2,586,291 in net operating income and an operating ratio of 93.50%. Subsequently, this prediction was modified by the company; its revised estimate was $39,901,947 in gross revenues, a net operating income of $2,593,627 and a 93.50% operating ratio.

Based upon our findings, however, a recasting of results under the proposed fares produces the following income statement:

TABLE II

Operating Revenues:	
Passenger Revenue (Co. Exh. 4, Sched. 1) ...	$37,402,453
Charter (Staff Exh. 31) ...	2,229,650
Government (Staff Exh. 31) ...	127,790
Limousine (Staff Exh. 31) ...	–
Station and Vehicle (Staff Exh. 31) ...	169,153
Other (Staff Exh. 31) ...	76,255
Total ...	$40,005,301
Operating Revenue Deductions:	
Operating Expenses ...	$31,997,863
Taxes, Other than Income Taxes ...	1,839,753
Income Taxes ...	1,278,788
Depreciation ...	2,394,647
Commission Directed Credits ...	–
Amortization of the Acquisition Adjustment ..	(194,516)
Total ...	$37,316,535
Net Operating Income ...	$ 2,688,766
Rate of Return ...	6.72%
Operating Ratio ...	93.28%

The revenues were computed using a .328% resistance factor. Since we have found that a .25% factor is proper in estimating revenues from increased fares, the passenger revenue is thus understated. Accordingly, the net operating revenue is depressed proportionately. However, even using the company's passenger revenue estimates the return which Transit would earn would substantially exceed the amount we have found to be proper. We find, therefore, that the proposed fares would be unjust and unreasonable.

Rate Structure Required to Earn Fair Return

In order to raise the net operating income by approximately one-half million dollars, additional revenues of $900,000 to $1,000,000 must be generated. Our remaining task then is to prescribe a fare structure which will generate the increased revenues, but at the same time be neither unduly preferential nor discriminatory either between riders or sections of the Metropolitan District. At the same time, we must give consideration to the effect of the prescribed rates upon the movement of traffic.

At the outset, we will consider the request of D. C. Transit to discontinue the use of interline tickets.

Shortly after the creation of this Commission, the regular route carriers were requested to devise an interline arrangement whereby a passenger could ride on the lines of two or more carriers by the payment of one fare. The four carriers worked out what is officially known as the interline ticket, and each carrier filed tariffs, with concurrences filed by the other carriers, formally proposing the establishment of this arrangement. Order No. 59, served September 7, 1961, accepted the carriers' plan and authorized a 35¢ interline fare ticket, the proceeds of which were to be divided equally among the partici-

pating carriers. Since then, additional charges have been permitted individual carriers (including Transit), in which there was no sharing of the proceeds of the additional charge.

In this proceeding, D. C. Transit filed supplemental tariffs which would cancel the interline agreements and do away with the interline ticket arrangement. The reason given by the Company for its proposal is the allegation that the subsequent changes in price have been confusing to the fare-paying public. It appears from the testimony that the principal reason for the company seeking to discontinue the use of the interline ticket is the fact that it is not getting an adequate distribution from the proceeds of the ticket. The evidence further reveals that the division of the revenues was not dictated by the Commission, but resulted from a voluntary agreement among the companies. The company admitted that prior to filing its request to discontinue the interline ticket arrangement in this case, it made no attempt to meet with the other carriers and seek a revised distribution of the proceeds of the tickets. The interline ticket arrangement has been widely accepted by transit riders in the Metropolitan Area, and they have come to depend upon its availability.

A. B. & W. Transit Company, one of the regular route carriers involved in the interline ticket arrangement, formally objected to the discontinuance thereof, contending that Transit should not be permitted to discontinue the arrangement ex parte. Rather, A. B. & W. asserts that a separate proceeding is required in which all the participating carriers are named as respondents and formally made parties to that proceeding. It further asserts that to permit Transit to withdraw unilaterally from the arrangement will in effect eliminate the use of the interline arrangement by the remaining carriers, and the

result would be a disruption to, and a change in, the fare structure of the three remaining carriers.

This Commission has previously ruled that any one of the participating carriers may not unilaterally change the basic agreement. (Order No. 312, served September 20, 1963, *In the Matter of WMA Transit Company for Authority to Increase Fares).* We affirm now that it appears that one of the participating carriers may not unilaterally and ex parte change the basic interline fare arrangement. Moreover, legal considerations aside, we find that the company has not justified its proposal to discontinue the interline arrangement. Accordingly, on the legal basis discussed above and on the facts in this record, we will not permit the company to discontinue the use of the interline ticket; its supplement proposing the same will be rejected and the tariffs authorizing the interline arrangement, including the division of revenues emanating therefrom, will continue in effect. This does not, of course, preclude Transit from seeking a voluntary re-distribution of the proceeds or the instituting of a formal proceeding naming the participating carriers to the arrangement as respondents thereto. However, the changes in fare structure we promulgate will not include any change in the interline ticket.

We will now turn to a discussion of the new fares which will produce the amount of additional revenue needed to afford the company the net operating income to which we have found it is entitled.

During the course of this proceeding, the Commission directed the company and the staff to present recommended changes in the existing fare structure which would produce additional revenues in increments of $300,000, up to $2,100,000. In our instructions, we directed that in calculating the increase to be generated by the increased fares, a fare resistance factor of .25% be employed.

We have previously discussed this subject in our consideration of estimating revenues for the future annual period at *present* fares. Normally, we would expect the resistance factor of .20% to be valid under proposed fares. However, in view of the fact that the fares must be raised again so soon after a previous increase, we feel that more resistance will develop than would otherwise occur. Accordingly, in our opinion, based on all these factors, we estimate that revenues in the future annual period under increased fares will be subject to a resistance of about .25% for each 1% increase in fares. We are confident that the turnover and increase in population, improved service, and the small amount of the fare increase, will tend to keep the resistance below that estimated by the company, below the "averaged" formula of Mr. Curtin – indeed, at the lower limit of the range of resistance percentages calculated by Mr. Curtin when he used the data of D. C. Transit's last previous rate case.

In compliance with our directive, D. C. Transit proposed ten alternate fare structures (DCT Exh. 54). Two alternates proposed by the company produced revenues which bracket the additional amount of money which we have found must be generated. Its proposal "E" would retain the present fare structure with two exceptions: the cash fare would be increased by 5¢ to 30¢ and the interstate express fare would be increased by 5¢. This proposal would increase revenues by $910,115.

Its proposal "D" would increase the following fares: cash fare by 5¢ to 30¢, the D. C. token fare by ½¢ to 25¢, interstate local ticket by 5¢ to 45¢ for the first zone, a 5¢ increase in the interstate express fare, and a 15¢ increase in the D. C. Stadium fare. This proposal would increase revenues by $1,285,750.

The staff recommended 12 alternate fare structures pursuant to our directive (Exh. S-46). Two alternates

proposed by the staff produce revenues that bracket the additional amount of money which must be raised. Staff alternate "8" would make the following changes in fares: a 2¢ increase in the cash fare to 27¢; a ½¢ increase in token fare to 25¢; a 5¢ increase in the interstate express fares; an increase of 5¢ in the interstate local zones 2 and 3; a 2¢ increase in the Maryland intrastate local zones 1 and 2, a 5¢ increase in zone 3; and a 15¢ increase in the fare to D. C. Stadium. These changes in fares would produce an additional $1,110,755.

On the other hand, the staff alternate "7" would produce an additional $982,800 by the following change in fares: increase the D. C. cash fare from 25¢ to 27¢; increase the token fare ½¢ to 25¢; increase the interstate express by 5¢; increase the interstate local zones 2 and 3 by 5¢; and increase the D. C. Stadium fare by 15¢.

Transit's existing fare schedule was approved by us in Order No. 684 as one reflecting fair and reasonable fares, which were neither preferential nor discriminatory between riders or sections of the Metropolitan District. We discussed at length in that order why we reached those conclusions. Our guiding principle in the instant case has been to distribute the burden of the latest increase as broadly as possible over the existing fare structure. In light of this principle, we will reject Transit's recommendation of a charge for transfers. We again conclude that in light of the company's present financial needs, and the means available to meet those needs, a charge for transfers would not be appropriate.

In weighing the alternate fare structures presented by the company and the staff, we have considered the desirability of having a spread between the cash and token fares, and the degree of spread. We have concluded that the nickel difference proposed by the company is too great from a practical standpoint and one which approaches discrimination from a legalistic viewpoint. We

feel that staff alternate "8", with some modification as hereinafter set forth, will produce the additional revenue required and at the same time effect a broad distribution over the entire spectrum of the ridership of this system. Therefore, we prescribe that the existing fare structure remain in effect, except for the following changes:

1. D. C. cash fare raised to 27¢
2. Token fare is raised to 25¢, to be sold in increments of four for $1.00
3. The Maryland intrastate fare is raised in zones 1 and 2 to 27¢[6]
4. The intrastate local zones 2 and 3 are raised 5¢ each to 50¢ and 60¢ respectively

[6] This would cover the bulk of the intrastate Maryland riders.

The revenue to be generated from the change in fares is computed as follows:

Staff Alternate "8" (Exh. No. S-46, 47)	$1,110,755
Exclude: (a) zone 3 local.....	38,732
(b) interstate express.....	95,000
(c) D. C. Stadium	5,023
	$ 972,000

Table III

PROJECTED OPERATING STATEMENT FOR THE FUTURE AT FARES PRESCRIBED BY THE COMMISSION

Operating Revenues:	
Passenger Revenue.....	$35,292,612
Charter	2,229,650
Government.....	127,790
Limousine.....	–
Station and Vehicle	169,153
Other.....	76,255
Total	$37,895,460
Operating Revenue Deductions:	
Operating Expenses	$31,997,863
Taxes, Other than Income Taxes	1,074,753
Income Taxes	598,299
Depreciation.....	2,394,647
Commission Directed Credits.....	–
Amortization of the Acquisition Adjustment .	(194,516)
Total	$35,871,046
Net Operating Income	$ 2,024,414
Rate of Return.....	5.34%
Operating Ratio.....	94.66%

The revised fare structure will enable Transit to retain the attractive advantage of a cheap form of transportation when compared with the cost of movement by private automobiles. Moreover, this fare structure will afford the citizens of the Washington Metropolitan District served by D. C. Transit a public transportation service at a cost generally below that offered in other metropolitan areas, either by private or public transportation systems. It is our opinion that these rates will have the least effect upon the movement of traffic by this carrier of the various fare structures suggested. Moreover, it is our opinion that it will produce the least resistance required by an increase in fares and at the same time serve as an attraction to new patrons, thereby continuing the upward trend in growth which has been experienced in the past several years.

We conclude therefore, that the fare structure we establish in this order is a just and reasonable one. The distribution of the burden of the increase falls equitably between riders and sections of the metropolitan area.

We need only note one further point. The fares we establish hereby will become effective at 12:01 A.M. on January 28, 1968. The 150 day period during which we can suspend the company's proposed fare structure expires at that time so we have little choice in the matter of timing. In any event, this timing is in keeping with our usual practice when changing the price of tokens.

FINDINGS OF FACT

We have stated our findings of fact on the issues in this proceeding in our discussion hereinbefore.

CONCLUSION OF LAW

The Commission concludes as a matter of law:

1. That the present fare structure of applicant is unjust and unreasonable in that it will not produce sufficient revenues in the future to enable the carrier to meet operating expenses and earn a reasonable return.
2. That the fares proposed by applicant would be unjust and unreasonable in that they would produce net operating revenues in excess of a fair return.
3. That the fares authorized by this order are just and reasonable. They are not unduly preferential nor unduly discriminatory either between riders or sections of the Metropolitan District. They are necessary to enable this carrier, under honest, economical, and efficient management, to provide an adequate and efficient transportation service, and they provide the means whereby this carrier may provide an adequate and efficient transportation service in the lowest cost consistent with the furnishing of such service. They will, moreover, afford this carrier the opportunity of earning that return which we have found is necessary to make it an attractive investment to private investors.

THEREFORE, IT IS ORDERED:

1. That the fares proposed by D. C. Transit System, Inc., in tariffs filed September 1, 1967, and previously described in and suspended by Order No. 739, and further suspended by Order No. 766, be, and they are hereby, denied.

2. That applicant, D. C. Transit System, Inc., be, and it is hereby, authorized to file a tariff on or before January 27, 1968, to become effective at or after 12:01 A.M., January 28, 1968, reflecting the following changes in fares:

(a) Cash fare - D. C.: 27¢

(b) Token Fare: Four (4) tokens for $1.00; provided, outstanding tokens shall be honored as though purchased at new rate.

(c) Interstate Local Zone 2: 50¢; Zone 3: 60¢

(d) Maryland Intrastate Local Service: 27¢ cash for the first two zones of carriage; or any part thereof; 8¢ additional cash for the third zone, or any part thereof.

3. That the applicant shall make the proper entries on its official books and records, effective January 1, 1968, to reflect:

(a) the disallowance of expenses incurred in transporting sightseeing passengers from points in Virginia to its sightseeing terminal in the District of Columbia;

(b) operating revenue at the rate of $23,400 per annum for distributing the D. C. Examiner newspaper;

(c) the amortization of the Health and Welfare assessment for a period of 22 months ending October 31, 1969;

(d) the disallowance of $7,510 per year for rent at 1420 New York Avenue, District of Columbia;

(e) the special fund in the amount of $141,674; the company shall debit its earned surplus account accordingly and establish a "Reserve for Commission-Ordered Projects" for that amount. To this end, a special account shall be established and actually funded on or before February 15, 1968; no expenditures shall be made from this fund except upon the express written approval and directive of the Commission.

4. That the program for purchasing new buses established by the Commission in its Order No. 362 be, and it is hereby, modified to provide that the applicant shall purchase on the average each year, beginning June 1, 1968, a number of new air-conditioned buses equal to

1/14th of the number of buses in its fleet. Retirements of buses shall be subject to review and approval by the Commission.

5. The applicant shall purchase 85 new air-conditioned buses for use in its mass transit operations, such buses to be delivered prior to June 1, 1968. Not later than February 10, 1968, the applicant shall submit satisfactory proof to the Commission that such an order has been placed.

6. That, contingent on the compliance by applicant with paragraphs 4 and 5 of this order, the cost of all buses acquired by it subsequent to 1956 shall be amortized, beginning February 1, 1968, in the form of depreciation charges in equal monthly amounts over a period of time so as to allow the recovery of the net book value, as of January 31, 1968, less a salvage value of 4% of the original cost new, in 14 years from the date such buses were first placed in service.

BY DIRECTION OF THE
COMMISSION:

GEORGE A. AVERY
Chairman

HOOKER, Commissioner, did not participate in the decision on this matter for the reason that he was unable to be present at any of the hearings.

APPENDIX

ORDER NO. 773

	Fares in Effect Prior to This Order	Transit's Proposed Fares	Fares Authorized Herein
District of Columbia			
Cash	$ .25	$ .30	$ .27
Token	.2450 (4/98¢)	.275 (4/1.10)	.25 (4/1.00)
Interline	.35 + 5¢	Discontinue	.35 + 5¢
Capitol Hill Express	.60(a)	.60(c)	.60(f)
Minibus	.10	.10	.10
School	.10	.10	.10
Transfer	Free	.05	Free
Maryland			
Interstate Local			
Zones 1	.25	.25	.27
2	.25	.25	.27
3	.35	.35	.35
4	.45	.45	.45
5	.50	.50	.50
6	.55	.55	.55
7	.60	.60	.60
8	.65	.65	.65
9	.70	.70	.70
10	.75	.75	.75
11	.80	.80	.80
12	.85	.85	.85
Interstate Local			
Zones 1	.40(b)	.55(d)	.40(b)
2	.45(b)	.55(d)	.50(b)
3	.55(b)	.65(d)	.60(b)
4	.65(b)	.75(d)	.65(b)
5	.70(b)	.80(d)	.70(b)
6	.75(b)	.85(d)	.75(b)
7	.80(b)	.90(d)	.80(b)
8	.85(b)	.95(d)	.85(b)
9	.90(b)	1.00(d)	.90(b)
10	.95(b)	1.05(d)	.95(b)
11	1.00(b)	1.10(d)	1.00(b)
12	1.05(b)	1.15(d)	1.05(b)

WMATC Order 773

	Fares in Effect Prior to This Order	Transit's Proposed Fares	Fares Authorized Herein
Interestate Express			
Md. - D.C. Line	$ .35(b)	$ .40(e)	$ .35(b)
Zones 1	.50(b)	.55(e)	.50(b)
2	.60(b)	.65(e)	.60(b)
3	.70(b)	.75(e)	.70(b)
4	.80(b)	.85(e)	.80(b)
5	.85(b)	.90(e)	.85(b)
6	.90(b)	.95(e)	.90(b)
7	.95(b)	1.00(e)	.95(b)
8	1.00(b)	1.05(e)	1.00(b)
9	1.05(b)	1.10(e)	1.05(b)
10	1.10(b)	1.15(e)	1.10(b)
11	1.15(b)	1.20(e)	1.15(b)
12	1.20(b)	1.25(e)	1.20(b)
Other			
Silver Rocket	.35 3 Zones .10 ea. add'l. zone Transfer Privilege	.35 3 Zones .10 ea. add'l. zone Transfer Discontinued	.35 3 Zones .10 ea. add'l. zone Transfer Privilege
Stadium	.60	.75	.60
Virginia Interstate Zone (Route C-1 Langley)	.10	.10	.10

(a) or valid transfer plus 40¢ cash
(b) valid transfer or token has 25¢ value toward total cash fare
(c) or valid transfer plus 33¢ cash
(d) valid transfer or token has 30¢ value toward total cash fare
(e) valid tranfer or token has 27¢ value toward total cash fare
(f) or valid transfer plus 35¢ cash

WMATC Order 882

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION
WASHINGTON, D. C.

ORDER NO. 882

IN THE MATTER OF: Served October 29, 1968

Application of D. C. Transit System, Inc., for Authority to Increase Fares.) Application No. 505
) Docket No. 186

On October 18, 1968, we issued Commission Order No. 880, in which we took up the issues raised by the application of D. C. Transit System, Inc. ("Transit") for an increase in fares. We need not review that order in detail. Suffice it to say that after a thorough canvass of the issues we determined that it was necessary to grant D. C. Transit a fare increase which would produce additional passenger revenues of approximately $1,715,801. Putting it another way, we determined in Table II, p. 22, of Order No. 880 that, in the future annual period, the company would obtain passenger revenues of $34,047,169 under present fares. Our review of the company's revenue requirements caused us to conclude that the company *should* obtain passenger revenues of $35,762,970 during that period. Passenger revenues in this amount, when coupled with all other revenue, including the new school fare subsidy payment now available to the company, would enable it to cover its interest expense and cost of debt service. We felt that this was sufficient for an interim period while we consider the issues involving the riders' fund raised by the court of appeals decisions issued on October 8, 1968.

In Order No. 880, we directed the parties to prepare proposals for fare changes which would produce the additional revenues we found it necessary to authorize.

Such proposals were prepared and were aired at a public hearing held on October 25, 1968.

The present intra-District fares are 27¢ cash and 25¢ token, with tokens sold in multiples of 4 for $1.00. In general terms, the changes in intra-District fares discussed at the October 25 hearing may be described as follows:

(1) A straight 28¢ fare at all times;

(2) A straight fare of 30¢ during peak periods and a straight fare of 25¢ during off-peak periods. (There was considerable discussion as to the hours during which a 30¢ fare would be necessary.)

(3) A more traditional approach which would preserve both a cash and a token fare with a differential in price between them. Two alternatives discussed were a 30¢ cash fare with tokens at 25¢ (4 for $1.00) and a 30¢ cash fare with tokens at 26.25¢ (4 for $1.05).

Before taking up these alternatives in detail, we should discuss the changes required in other fare categories. We believe that the changes originally proposed by D. C. Transit for all other fare categories are appropriate. We had stated in Order No. 880 that two principles must be pursued. First, the burden of the increase should be spread equitably over all classes of riders. Second, we directed that, to ensure that the school fare subsidy payment is applied solely to intra-District fares, adjustments in non-intra-District fares be made as though the subsidy payment were not available to reduce the required amount of farebox revenues. We think that the changes proposed originally by the company meet these standards. These changes principally involve three categories, interstate local, interstate express, and intra-state local fares.

The changes proposed by the company have the very considerable advantage of producing a rational and symmetrical fare for the company's suburban services. In intrastate local service, the fares start out at 30¢, a level which will also be an integral part of intra-District fares. Beyond two zones, which encompasses a distance about equal to an average intra-District ride, in the staff's judgment, the fare increases in 5¢ increments in accordance with distance travelled. In interstate local service, the fare starts out at 40¢, a 10¢ increment for crossing the District line, and increases by distance travelled, initially at the rate of 10¢ per zone, and beyond zone 4 at 5¢ per zone. The interstate express fare has a similar structure, but in every zone is 10¢ higher than the interstate local fare, reflecting the higher grade of service. Thus, each suburban fare category has a rational structure, understandable to the patron. Further the structure of all categories, when each is compared with other categories, whether suburban or intra-District, forms a harmonious whole. We think this is a desirable result in general, and it is particularly so at this time. We have indicated in Order No. 880 that we will shortly be undertaking a cost allocation study as one of the bases for establishing a just, reasonable, and non-discriminatory rate structure. We have no knowledge at present as to what action will be required as a result of that study. However, we are convinced that it is highly desirable to start out the study with a rational, balanced rate structure since this will provide a solid foundation on which to impose any needed changes. Hence, we feel that the changes proposed by D. C. Transit in fares other than D. C. cash and token fares are appropriate, and that the resulting fare structure is one which is just, reasonable, and non-discriminatory, particularly for the period during which we are undertaking a cost allocation study as a further source of data for establishing rates.

The fare raises just discussed will produce additional revenue of about $200,000. This is about 12% of the actual farebox revenues increase of $1,650,000 and about 7% of the total additional revenues, including the school fare subsidy payment. Chairman Avery wishes to note that in some circumstances he would consider that the non-District increases should produce a percentage of the total increase more in line with the 85%/15% breakdown which presently exists between D. C. and non-D. C. fares. He has not so ruled in this proceeding for three reasons:

1. The harmonious rate structure which results from now adopting the changes proposed by D. C. Transit seems highly desirable;
2. Making further changes to bring about the target percentage relationship would shift only about $100,000 of the required increase from D. C. to non-D. C. sources. This relatively small shift would not make possible any reduction in D. C. fares below the level we find hereinafter to be necessary.
3. In any event, the cost allocation study will provide a firmer basis than we have at present for making a judgment as to the validity of the percentage relationship mentioned above. In the meanwhile, the existing relationship will remain essentially undisturbed by our present decision.

We can turn, then, to the question of changes in the D. C. cash and token fares. We have previously noted that the changes we here authorize must produce passenger revenues totalling $35,762,970. The changes we discussed above will produce revenues from all fare categories other than D. C. and token totalling $7,563,872. Thus, we must establish D. C. cash and token fares

which will produce revenues of about $28,200,000. As previously noted, we have three proposals before us: a straight 28¢ fare; an on peak/off peak fare differential; a cash/token fare differential. In addition, of course, we might consider any alternative or variation in these which could be justified by the facts of record.

We can eliminate the first alternative quickly. We think that a straight 28¢ fare is too cumbersome, particularly under the exact fare system presently in effect on D. C. Transit. Moveover, we think there are substantial benefits available through maintaining some sort of price differentials for justifiable classes of users.

We can narrow our choice, therefore, to the on peak/off peak differential or the cash/token differential.

We have given serious consideration to the on peak/off peak alternative. It offers many advantages. First, it has sound economic justification in that it reflects the higher costs associated with meeting the burden of peak-level demand. Second, it offers the opportunity, at least, of levelling out the peak to some extent. Third, it provides a means of preserving for a further period of time a 25¢ fare for D. C. riders. On the other hand, it appears that its impact upon the low income group is the subject of some dispute. In fact, the precise nature of this impact can only be a matter for conjecture since there is no way of measuring travel patterns, and particularly potential travel patterns, with precision. Thus, it can be argued on the one hand that a reduced off peak fare can result in savings for low income persons who are unemployed, or for dependents of employed low income persons. On the other hand, the burden of higher fare during rush hour on those of low income who must travel during that period is obvious.

We think that the true outlines of the problem only begin to emerge when the specific facts are considered. Hence, we will turn to these.

WMATC Order 882

1. *What level of fares are we talking about?*

In terms of the financial requirements of the company, the only off peak/on peak fare differential which can be considered is a 30¢ fare during peak periods and a 25¢ fare during off peak periods. Higher fares would produce too much revenue and lower fares would produce too little.

2. *During what hours would these fares be in effect?*

This question was the subject of much discussion at the hearing. The company suggested that the 30¢ fare should apply from 4:00 A.M. to 10:00 A.M. and from 3:00 P.M. to 9:00 P.M. on weekdays and that the 25¢ fare should apply at all other times. The staff suggested that the 30¢ fare apply from 6:00 A.M. to 10:00 A.M. and from 3:00 P.M. to 7:00 P.M. weekdays and the 25¢ fare at all other times. Despite the difference in hours, the resulting dollar revenues projected by the company were essentially the same as those projected by the staff. This was because the company assumed immediate and substantial shifts in ridership from the high fare to the low fare period. Specifically, they argued that 50% of those now riding in the first and last hour of the high fare period would shift and that 25% of those now riding in next-to-first and next-to-last hour of the high fare period would shift. The staff proposal assumed that no such substantial shift in riding would take place. We think the staff has much the better of this dispute. It seems apparent that those who ride buses during the peak period of 6-10 A.M. and 3-7 P.M. are doing so because they are en route to and from work or on other unavoidable errands and we think that the assumption that substantial numbers of them would shift simply flies in the face of common sense. For instance, it appears highly unlikely that any substantial number of those who

now travel between 5 P.M. and 6 P.M. would wait until after 7 P.M. in order to save a nickel. Hence, were we to adopt this proposal, we would authorize the 30¢ fare from 6 A.M. to 10 A.M. and from 3 P.M. to 7 P.M. on weekdays, with a 25¢ fare at all other times.

3. *What percentage of passengers would be paying 30¢ and what would the resulting revenues be?*

Both the company and the staff based their revenue projections for the on peak/off peak alternative on a study of ridership patterns undertaken by Alan M. Voorhees & Associates in 1966. This thorough survey of ridership patterns produced evidence as to the number of persons who ride the bus during each hour on a normal weekday. Both staff and company agreed that the data were reliable and produced a picture which was confirmed by their own judgment as to riding patterns. Saturday, Sunday, and holiday ridership was determined from independent, reliable sources. The data indicated that about 55% of the total number of riders would ride when the 30¢ fare is in effect and that about 45% would ride in the remaining periods, paying 25¢. This rate structure would produce revenues from this source of about $28,160,000, and total passenger revenues of about $35,781,000.

4. *What is the actual rate structure necessary if the cash/token differential were adopted?*

As a starting point for resolving this question, we believe that a 30¢ cash fare is necessary. The alternatives—28¢ or 29¢—are cumbersome and confusing, particularly with the exact fare system now in effect. Moreover, the 30¢ fare is required if the on peak/off peak alternative were to be adopted and to make a valid and sensible comparison with the cash/token alternative we should

begin with the same base. Hence, the next question is this: Assuming a 30¢ cash fare, what token fare is necessary in order to produce the necessary revenues? To answer this question, a determination as to the cash/token split at any given differential must be determined.

We began by exploring the possibility of retaining the token rate at 25¢ (4 for $1.00). We were hopeful that this would produce the needed revenues. Unfortunately, we were unable so to conclude. To produce approximately $28,200,000 with a cash fare of 30¢ and a token fare of 25¢ a cash/token split of almost 50/50 is necessary.[1] At present the cash fare is 27¢ and the token fare 25¢ and the split is *now* 50/50. Therefore, in order to be able to conclude that a 25¢ token rate would suffice, we would have to be able to assume that there would be no substantial change in the existing cash/token ratio. This is an untenable assumption. If the cash fare rose from 27¢ to 30¢ and the differential in price between cash and tokens rose from 2¢ to 5¢, the inevitable result would be a significant increase in token usage from present levels. This is confirmed by the fact that in 1962, when there *was* a 5¢ differential (cash 25¢, token 20¢) the cash/token split averaged about 74% tokens and 26% cash. Undoubtedly, these levels would not be reached with tokens not as readily available as they were in 1962. However, an assumption that no change would take

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	Present	Rides	Projected Fare	Total Projected Rides After Resistance Factor
D.C. Cash Fare.....	27¢	35,651,513	30¢	34,653,270
D.C. Token Fare.....	25¢	68,264,009	25¢	68,264,010
		103,915,522		102,917,280

Split required to arrive at revenue of $28,200,000:
48.3% = 49,709,046 rides at 30¢ = $14,912,714
51.7% = 53,208,234 rides at 25¢ = $13,302,058
$28,214,772

place in the existing ratio is simply unacceptable. We conclude, then, that the token price must be above 25¢ if the needed revenues are to materialize.

After considering all the evidence and exercising our own judgment as to the probable cash/token split, we have concluded that the revenues required will be produced by a cash fare of 30¢ and a token fare of 26.25¢ (4 for $1.05). We feel that the impact of a cash fare at the 30¢ level, when coupled with an increase in savings on token purchases from the present 2¢ to 3.75¢, will bring the cash/token split back close to the levels which were being experienced before the advent of the exact fare system. Specifically, we think that the assumption of a 65% token/35% cash split is a valid and acceptable one. At this ratio, the 30¢ cash and 26.25¢ token fare structure would produce revenues from this source of $28,131,384.

With these facts before us, we are in a position to make a sound judgment as to the relative merits of the two alternatives. The on peak/off peak alternative has much merit. It has a sound basis in economics. It offers the possibility of more efficient use of the system. It preserves the 25¢ fare for a further time. It actually offers the possibility of a rate reduction for some riders—those who now ride in the off peak hours and do not use tokens, paying 27¢.

On the other hand, we are persuaded that the cash/token alternative is the preferable one. We base this conclusion on several reasons.

First, it should be noted that if the on peak/off peak differential is chosen, 55% of the riders will be paying the 30¢ fare. See p. 5, *supra*. With the cash/token differential, however, only 35% of the riders will be paying 30¢. The reason is obvious, of course. The extra 1.25¢ paid by the token user makes it possible to produce the

total revenues required with the lower number of persons who will be paying the 30¢ fare.

Second, the option whether to pay the 30¢ fare is, under the cash/token alternative, within the control of the rider. Under the on peak/off peak alternative, the choice would in many cases, if not most, be forced upon the rider by his need to ride in the peak hour.

Third, we recognize that the cash/token alternative has the disadvantage that the lower fare available is 26.25¢ rather than 25¢. However, the burden this imposes is outweighed, in our judgment, by the greater number of persons to whom the lower fare is available. The burden of this change from 25¢ to 26.25¢ is not overwhelming. For a person who rides 10 times each week, it amounts to only $6.50 in a year.

In sum, we believe that an alternative which requires about 20 million more passengers annually to pay a 30¢ fare, in most cases due to circumstances they cannot control, should not be preferred to an option which avoids this result. This is particularly so when the lower fare is available to all who wish to choose it and when it is not higher to a burdening degree than the lower fare available under the first alternative. We will, therefore, authorize an intra-District fare structure of 30¢ cash and 26.25¢ tokens, with tokens to be sold in multiples of 4 for $1.05.

One additional fare category requires comment, *i.e.*, the interline ticket. When such tickets are used on D. C. Transit buses at present, the company receives an additional 5¢ payment from the rider. They propose raising this payment to 10¢. This would reduce the savings from use of an interline ticket in most cases to minimal levels. We believe that the interline ticket offers substantial benefits from the standpoint of maximizing the use of public transit and we are loathe to take a step which will practically eliminate those benefits. Hence, we will re-

tain the present additional charge levied by D. C. Transit for use of an interline ticket.

Our conclusions on fare structure, therefore, are these: The increases proposed by D. C. Transit for Maryland intrastate, interstate local, Capitol Hill Express, interstate express and stadium service should be granted. The D. C. cash fare should be 30¢ and the token fare should be 26.25¢, with tokens sold in multiples of 4 for $1.05. The additional charge for use of an interline ticket should remain at 5¢. The fares in effect prior to this Order, the proposed fares, and the fares authorized herein are tabulated in Appendix A to this Order. With the fares we here authorize, we project the following results in the future annual period:

Projected Operating Statement
At Fares Prescribed by the Commission

Operating Revenues:		
Passenger Revenue		$35,695,256
Charter		2,104,578
Government Contracts		125,305
Station and Vehicle Privileges		171,904
Other		68,412
Total Operating Revenues		$38,165,455
Schoolfare Subsidy (7,145,551 rides at 16¼¢)		1,161,152
Total Revenues		$39,326,607
Operating Revenue Deductions:		
Operating Expenses	$34,367,584	
Taxes, Other than Income Taxes	1,303,702	
Depreciation	2,475,154	
Amortization of Acquisition Adjustment	(194,516)	
Total		37,951,924
Net Operating Income		$ 1,374,683

It should be noted that, in the foregoing table, the school fare subsidy payment is shown at $1,161,152 rather than the $1,100,000 discussed in Order No. 880,

p. 45. This is because, with the fare changes here authorized, the lowest adult fare becomes 26.25¢. Since the subsidy payment is based on the difference between the school fare and the lowest adult fare, the subsidy payment will now be 16.25¢ per child carried, rather than the 15¢ previously applicable.

As demonstrated by the foregoing table, these fares will enable the company to operate at a viable level, recovering its operating expenses and covering debt service while we give consideration to the issues involving the riders' fund arising from the recent decisions by the court of appeals. The net operating income of $1,374,683 will be used to meet interest expense totalling $1,346,000 in the future annual period.

FINDINGS OF FACT

We have stated our findings of fact on the issues in this proceeding in Order No. 880 and in the foregoing discussion in this Order.

CONCLUSIONS OF LAW

The Commission reached the following pertinent conclusions of law in Order No. 880:

1. That the present fare structure of applicant is unjust and unreasonable in that is will not produce sufficient revenues in the future annual period to enable the carrier to meet operating expenses and earn a reasonable return, thus imperiling the company financially.
2. That the issues regarding a riders' fund raised by the opinion of the U.S. Court of Appeals in *Williams* v. *WMATC*, require that no return on equity be allowed for the time being.
3. That a just and reasonable fare structure on an interim basis would be one which produces

gross revenues, before the school subsidy payment, totalling $38,233,169 in that such revenues would enable the company to cover operating expenses and the cost of debt service.

4. That the fares proposed by applicant would be unjust and unreasonable in that they would produce gross revenues in excess of the amount set forth in paragraph 3 above.

The Commission here reaches the following additional conclusion of law:

1. That the fares authorized by this Order are, pursuant to the provisions of Article XII, Section 6(b) of the Washington Metropolitan Area Transit Regulation Compact, found to be just, reasonable, not unduly preferential nor unduly discriminatory either between riders or sections of the Metropolitan District, particularly in light of the issues pending as a result of the decisions of the court of appeals rendered on October 8, 1968, in Docket Nos. 20,200; 20,201; 20,202; 20,714; 20,744; 21,029; and 20,988, and particularly pending the results of a cost allocation study to be undertaken by the Commission.

THEREFORE, IT IS ORDERED:

1. That the fares proposed by D. C. Transit System, Inc., in tariffs filed July 17, 1968, and previously described in and suspended by Order No. 854, be, and they are hereby, denied, except as otherwise herein prescribed.
2. That D. C. Transit System, Inc., be, and is hereby, authorized to file tariffs on October 29, 1968, to become effective at 4:00 A.M., Octo-

ber 31, 1968, except that the authority relating to tokens shall be effective 12:01 A.M., October 30, 1968, reflecting the fares prescribed hereinabove and as set forth in the Appendix attached hereto and made a part hereof; said tariffs shall specify a termination date of December 13, 1968.

3. That tokens outstanding on October 30, 1968, shall be honored as though purchased at the new rate prescribed herein.
4. That the Commission shall retain jurisdiction in this proceeding, with the power to make such further adjustments in fares as appear necessary in light of subsequent events, until the expiration of the suspension period set forth in Article XII, Section 6 (a)(2) of the Compact.

BY DIRECTION OF THE COMMISSION

GEORGE A. AVERY
Chairman

DOUB, Vice Chairman, concurring.

I concur in the conclusions reached by the majority of my colleagues in Order No. 882. I necessarily disagree with the majority in their continuing treatment of the schoolfare subsidy. My reasoning in this regard was the subject of a separate opinion entered with Order No. 880 on October 18, 1968. I am pleased to note that at the hearing on October 25, 1968, my position was supported by the representative for the Federation of Citizens Associations of the District of Columbia, which group presumably is among those that the majority decision was intended to favor; and also, by the views of the Commission's staff that the present relationship of Maryland fares to D. C. fares is proper.

I also take exception to the majority's conclusion as to the relative merit of an on-peak/off-peak alternative fare structuring technique under the circumstances present in this case. It is my understanding that this approach has frequently been found to be undesirable in other jurisdictions from the carrier's point of view, of no real benefit to transit riders as a group, and accordingly deserves little weight in the disposition of this matter.

Without reviewing all the objections to the on-peak/off-peak alternative, it can be said with considerable justification that fortuitous circumstances as to the requirement of use of transportation during on-peak hours would prevent a substantial number of riders from the benefits of the lower off-peak rates. However, the majority, in implementing the cash token differential has provided a reduced cost of fare to all riders subject only to their individual acceptance of the option.

Such objections as I may have to the conclusions reached in Order No. 882 are overcome by the knowledge that the fare structure adopted will produce additional revenues from Maryland riders that bears

reasonable relationship to those fares to be derived from D. C. riders. I am also persuaded to concur with the majority at this time inasmuch as the Commission will shortly have before it the benefit of a comprehensive study implemented with the view to establishing on a sound basis a proper relationship among all the fares charged by the company. In short substance, I believe that the end result of the fare structure ordered by the majority opinion is the best that can be achieved at this time under these circumstances.

WMATC Order 882

APPENDIX

ORDER NO. 882

	Fares in Effect Prior to This Order	Transit's Proposed Fares	Fares Authorized Herein
District of Columbia			
Cash	$.27	$.30	$.30
Token	.25(4/1.00)	.30(4/1.20)	.26¼(4/1.05)
Interline	.35 + 5¢	.35 + 10¢	.35 + 5¢
Capitol Hill Express	.60(a)	.65(a)	.65(a)
Minibus	.10	.10	.10
School	.10	.10	.10
Transfer	Free	Free	Free
Maryland			
Intrastate Local			
Zones 1	.27	.30	.30
2	.27	.30	.30
3	.35	.40	.40
4	.45	.45	.45
5	.50	.50	.50
6	.55	.55	.55
7	.60	.60	.60
8	.65	.65	.65
9	.70	.70	.70
10	.75	.75	.75
11	.80	.80	.80
12	.85	.85	.85
Interstate Local			
Zones 1	.40(c)	.40(b)	.40(b)
2	.50(c)	.50(b)	.50(b)
3	.60(c)	.60(b)	.60(b)
4	.65(c)	.70(b)	.70(b)
5	.70(c)	.75(b)	.75(b)
6	.75(c)	.80(b)	.80(b)
7	.80(c)	.85(b)	.85(b)
8	.85(c)	.90(b)	.90(b)
9	.90(c)	.95(b)	.95(b)
10	.95(c)	1.00(b)	1.00(b)
11	1.00(c)	1.05(b)	1.05(b)
12	1.05(c)	1.10(b)	1.10(b)

WMATC Order 882

	Fares in Effect Prior to This Order	Transit's Proposed Fares	Fares Authorized Herein
Interstate Express			
Md. – D. C. Line	.35(c)	.40(b)	.40(b)
Zones 1	.50(c)	.50(b)	.50(b)
2	.60(c)	.60(b)	.60(b)
3	.70(c)	.70(b)	.70(b)
4	.80(c)	.80(b)	.80(b)
5	.85(c)	.85(b)	.85(b)
6	.90(c)	.90(b)	.90(b)
7	.95(c)	.95(b)	.95(b)
8	1.00(c)	1.00(b)	1.00(b)
9	1.05(c)	1.05(b)	1.05(b)
10	1.10(c)	1.10(b)	1.10(b)
11	1.15(c)	1.15(b)	1.15(b)
12	1.20(c)	1.20(b)	1.20(b)
Other			
Silver Rocket	.35 3 zones .10 ea addl zone Transfer Privilege	.35 3 zones .10 ea addl zone Transfer Privilege	.35 3 zones .10 ea addl zone Transfer Privilege
Stadium	.60	.75	.75
Virginia Interstate Zone (Rt C-1 Langley)	.10(d)	.10(d)	.10(d)

(a) or valid transfer plus 35¢ cash
(b) valid transfer or token has 30¢ value toward total cash fare
(c) valid transfer or token has 25¢ value toward total cash fare
(d) available only in addition to D. C. – Md. Interstate or Md. Intrastate fares

A350

WMATC Order 900

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION WASHINGTON, D.C.

ORDER NO. 900

IN THE MATTER OF:

Order of Investigation of Fares of D. C. Transit System, Inc.	)	Served December 23, 1968
	)	
	)	Docket No. 194

The background for this present order is found in a series of earlier orders issued in connection with a proceeding instituted by an application of D. C. Transit System, Inc., seeking higher fares. In order No. 880, we determined that D. C. Transit would incur expenses totaling $39,333,169 in the future annual period. We further found that present fares would not provide sufficient revenues to cover those expenses.[1] We directed that a hearing be held to examine a fare structure which would produce the requisite revenues. At that hearing, the principal presentation was made by the Commission staff. Its presentation was based on the company's position that ridership during the future annual period would be at the actual level experienced during the year ending April 30, 1968, adjusted only for resistance to fare increases. Following that hearing, we issued Order No. 882 in which we raised D. C. fares to 30¢ cash, 4 tokens for $1.05. Maryland fares were also increased. These increases should, on the basis of the facts of record, have provided sufficient revenues to cover operating expenses and interest.

[1] We decided in Order No. 880 that the pendency of certain issues raised by the decision of the court of appeals in *Williams* v. *WMATC*, decided October 8, 1968, required that the company receive no return on equity for the time being.

Order No. 882 was an interim order and we awaited developments with regard to the riders' fund issues raised by the court of appeals' decisions so we could determine what should be done in our final order to be issued by December 13, 1968, the expiration of the 150 day statutory suspension period. On that date, certain issues raised by the court of appeals had been taken up to the Supreme Court by D. C. Transit in a petition for a writ of certiorari. Other issues, however, were not appealed by D. C. Transit and these unappealed issues also created the possibility of a riders' fund. In these circumstances, we felt that it was appropriate for the company to forego a return on equity for a further period. Hence on December 13, 1968, we issued Order No. 894, in which we terminated the proceeding instituted by D. C. Transit without any further adjustment in fares. In that order, however, we pointed out a problem raised by facts not of record in that proceeding. Specifically, it appeared that the fare increases authorized by Order No. 882 were not, in fact, producing revenues sufficient to cover the level of expenses we had found in Order No. 880 to exist. The reason appeared to be that ridership was not at the levels assumed by the company figures on which the staff had based its earlier presentation. A considerable decline had taken place. We felt that this was a problem that we should not ignore or overlook, so on December 13 we also entered Order No. 895, in which we instituted a further investigation into D. C. Transit's rates and set a hearing for January 14, 1969, at which the parties were directed to produce evidence concerning the further adjustments, if any, to D. C. Transit's fare structure to produce farebox revenues of $35,695,256 annually.

On December 16, 1968, D. C. Transit filed a motion with the Commission asking that the January 14 hearing be moved up. D. C. Transit represented that because of

its precarious financial condition it would be unable to continue operations until the conclusion of proceedings scheduled to begin on January 14, 1969. In the face of this serious representation, coupled with our independent knowledge of the company's financial condition, we moved the hearing from January 14, 1969, to December 19, 1968.[2]

The hearing was held on that date and we received testimony concerning the following subjects:[3]

1) The results being experienced by D. C. Transit in the period since October 31, 1968, under the fares authorized by Order No. 882.
2) The projected results for the future annual period under that fare structure, compared with the expenses we had found to exist in Order No. 880.
3) Suggested fare structures designed to produce additional revenues sufficient to cover projected expenses.
4) Data concerning the company's actual present financial condition and its projected financial condition if fares are not adjusted.

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[2] Wide publicity was given to the new hearing date in all news media.

[3] Chairman Avery presided at the hearing. Because the hearing date was moved up, the other Commissioners had commitments which prevented their attendance. Commissioner Doub was presiding at a major telephone rate case hearing at the Maryland Public Service Commission. Commissioner Hooker also had hearings scheduled at the Virginia State Corporation Commission. All Commissioners have received copies of the transcripts and exhibits and have reviewed them prior to issuance of this order.

Testimony and exhibits were presented by witnesses for the company and the staff.[4] The company presented testimony by Samuel O. Hatfield, its Vice President and Comptroller. Mr. Hatfield presented evidence concerning projected results on the basis of two assumptions: first, that the decline in ridership which had occurred in the past year would continue at the same rate throughout the future year ending December 20, 1969; second, that the declining trend would level and that ridership would continue at its present levels except for resistance to any additional fare increase. Under either assumption, the fares authorized by Order No. 882 would be entirely inadequate to meet the operating expenses and interest expenses which the company would incur. Mr. Hatfield suggested new fare structures sufficient to produce the required revenues, under either assumption. Mr. Hatfield also presented statements of financial condition which showed a steady decline in retained earnings due to operating losses. a steadily worsening ratio of current liabilities to current assets, an income statement for November, 1968, which showed that even under the increased fares authorized by order No. 882 the company had lost $227,768 in that month alone, and an analysis of cash flow which indicated that a serious cash deficit, amounting to over $600,000, would exist by January 15, 1969. No question as to these facts was raised by any party. Mr. Hatfield stated that D. C. Transit's credit was seriously impaired and that a number of suppliers were now requiring a C.O.D. arrangement.

The staff presented testimony by Charles W. Overhouse, its Chief Engineer, and Richard C. Kirtley, its

[4] The parties granted leave to intervene in the morning session were: (a) Diana K. Powell, pro se; (b) Alfred S. Trask, for the Federation of Citizens Associations of the District of Columbia; and (c) Paul R. Webber III, for the D. C. City-Wide Consumer Council, Northwest United Community Corporation Organization, and the Welfare Alliance of the District of Columbia.

Senior Accountant. The staff evidence demonstrated a downward trend in passengers but expressed the view that the trend had apparently now levelled. It indicated that November results were a reliable indicator of results to be expected during the entire year. It indicated that the existing fares would not produce revenues sufficient to cover the operating expense and interest we had found would exist in Order No. 880. It suggested a new fare structure which would produce the revenues required to meet expenses. Finally, they demonstrated the extremely serious decline in D. C. Transit's cash working capital.

The intervenors made no presentation of evidence but they did cross-examine staff and company witnesses. We also heard statements from a number of interested members of the public who were not formal parties to the proceeding.

This, then, is the evidence before us. We must now consider its implications. First, it is clear beyond question that the present fares will simply not produce the revenues needed by the company to cover operating expenses and interest. In Order No. 882, we found that this would require revenues from the farebox totalling $35,695,256.[5] Before deciding what actual results under present fares will be, we must decide whether the declining trend in passengers will continue or will level out. The Commission witness is of the opinion that it will level out and the company's witness, while leaving the final determination to us, was hopeful that it would level out. It is our opinion that we should base our decision on an assumption that the trend will level out and that the decline will not continue. All seem in agreement that the causes for the decline are linked to the civil

[5] These farebox revenues, when coupled with a school fare subsidy payment of $1,161,152 and non-farebox revenue of $2,470,199 would cover the company's operating expenses of $39,326,607.

disturbances of the Spring and the imposition of the script system. Those events are past and their impact has been absorbed. Moreover, the actual number of riders each week in recent weeks has been fairly steady. We will make the assumption that the ridership will be steady at the present levels, except for the resistance factor.

The next question is which projections of ridership based on this assumption to accept—that of the staff or that of the company. They both reach substantially the same result, although the staff projection is very slightly higher. Each employed a different methodology in reaching his results. With one exception, discussed at p. 5, *infra*, we find the staff approach preferable because it is tied more directly to the results actually experienced in the most recent period when the present fare structure has actually been in effect. Accordingly, on the basis of Staff Exhibit No. 4, we find that under present fares the company would obtain passenger revenue, excluding school fare subsidy, totalling $33,525,951.

To this must be added the school fare subsidy payment. It is on this item that we think that the company analysis is more exact than the staff. It must be recalled that there has been no change whatever in the actual school fare paid by riders. It has been, and remains, 10¢. Hence, no resistance or other changing factors need be considered. The company's analysis of actual riding in the most recent period available indicates a substantial increase over the same period of the preceding year. Hence, the company expects an increase in revenue from school passengers amounting to $74,314 and a school fare subsidy payment of $1,577,738. Their analysis of the increasing trend is confirmed by data available in the Commission files. The methodology employed by the Commission staff at the December 19 hearing did not take into account the increasing trend in this cate-

gory of service. We are convinced that the company projection of the school fare subsidy payment is the more accurate one and it is that figure we will use. Hence, with the previously noted farebox revenues of $33,525,951, the additional $74,314 in school fares actually collected and the school fare subsidy payment of $1,577,738, the passenger revenues which the company will obtain under present fares total $35,178,003.

As previously noted, these revenue sources must produce $36,856,489, if the company is to obtain the revenues necessary to cover the operating and interest expenses we found would exist in Order No. 880. Hence, the existing fare structure is unjust and unreasonable in that it will not produce sufficient revenues to enable the company to cover its operating expenses and interest cost.

Before turning to the question of specific fare changes needed to produce the required revenues, we should first discuss whether action is required now. The answer to this question is plain. The evidence of record makes it plain beyond dispute that this company is not presently obtaining revenues sufficient to cover its expenses. Its financial liquidity has been steadily deteriorating. Its cash working capital is fast disappearing. Perhaps most important, its ability to obtain further credit is seriously in doubt so long as fares at their present levels are not sufficient to stanch these serious losses. In these circumstances, we have a clear obligation to take immediate action to ensure the company's continued ability to provide the transit service so vitally needed by the community.

We turn, then, to a consideration of the changes in fare structure necessary to produce the revenues required. Both the company and the staff have recommended that the fare in the District of Columbia become a straight 30¢ and, in view of the company's present

financial requirements, we think that this is not only just reasonable, it is an inescapable conclusion.

Additional revenues are required beyond those produced by this change in D. C. fares and the resultant increase in the school fare subsidy payment. Both the company and the staff suggested, in effect, that the number of zones in suburban fares be reduced from twelve to six. The staff recommends that the zone fare in each new zone be the higher of the two present zone fares that would be included in the new enlarged zone, except in the case of Zones 1 and 2 of intrastate local service, in which the staff recommends that the fare be 35¢. The company would leave the fare in these first two zones of intrastate local service at 30¢. This produces less revenue from those two zones than the staff proposal, of course. The company would make up that revenue by imposing larger increases than those proposed by the staff in certain other zone fares. Specifically, the company proposes higher fares than the staff in the Maryland-D. C. line fare of interstate express service, as well as in Zones 1 and 2 of that service. In addition, the company proposes a higher fare than the staff in Zones 1 and 2 of interstate local service.

We have carefully considered both the company and the staff proposals for changes in suburban fares. We are very cognizant of the fact that we are just undertaking a cost allocation study in accordance with the recent directive of the court of appeals. We are sure that the results of that study will be useful in forming a judgment as to appropriate changes not only in suburban zone fare levels but in the structure of the zones themselves. We believe it is unwise at this juncture to undertake the radical restructuring of the zones suggested by the company and the staff. To reduce the number of zones from twelve to six at this point would cause serious disruptions to the zone pattern. We might wish to make fur-

ther changes in that pattern when the cost allocation study is complete. Two such changes in a short period could lead to considerable confusion and misunderstanding on the part of the riding public. We think it is preferable to raise the additional revenues now needed by leaving the present zone structure intact and raising existing zone fares by the amount needed to produce the required revenues. Using figures in the record we find that adding five cents on to each present zone fare, other than Zones 1 and 2 of intrastate local service, will produce the following results:

Types of Passengers	Revenue
Total Cash and Tokens	$27,557,606
Interline Ticket	952,697
Maryland Intrastate	2,463,185
D. C. and Maryland Interstate Local	1,759,733
School	788,869
Downtown Shoppers	104,804
Capitol Hill Express	39,302
Silver Rocket	141,879
D. C. and Maryland Interstate Express	1,491,274
D. C. Stadium	60,000
Total	$35,359,349

In effect, this suburban fare structure produces approximately the same amount from that source as the increases proposed by the staff at the hearing. Actually, the total is about $23,000 higher. We do not find it necessary to adopt the staff suggestion that the fare in the first two zones of intrastate local service be raised from 30¢ to 35¢ because the higher estimate of the school fares actually to be collected and the higher school fare subsidy payment discussed at p. 5, *supra,* plus the additional $23,000 raised by the suburban fare changes we here adopt produces the revenue which the staff sought through its suggested change.

We believe that the fare changes we authorize produce a rational and balanced fare structure for the period during which we make the cost allocation study discussed in the opinion of the court of appeals in *Payne* v. *WMATC.* The straight 30¢ fare in the District is a round figure, easily understood by the riding public. It will produce approximately the same percentage of total passenger revenues as has been the case in the past. The same 30¢ fare will apply in the first two zones of intrastate local service. As we discussed in Order No. 882, we think that the service provided in these first two zones of intrastate local service is substantially identical to intra-District service, and having an identical fare for both, when possible, is highly desirable. The remaining zones of suburban service are all treated in a rational and consistent manner, each being raised five cents. By means of the changes authorized herein, $2,249,984 of additional revenue is being raised, 85 percent from District sources and 15 percent from suburban sources. These are approximately the same percentage relationships which have applied to past increases. Accordingly, we reiterate our conclusion that the fare increases authorized herein, as set out in Appendix A hereto, produce a rational and balanced fare structure which we

find to be just, reasonable, and not unduly discriminatory.

They will produce the following financial results:

Projected Operating Statement
At Fares Prescribed by the Commission
Effective December 24, 1968

Operating Revenues:		
Farebox Revenues		$35,359,349
Schoolfare Subsidy (7,888,688 rides at 20¢)		1,577,738
		$36,937,087
Charter		2,104,578
Government Contract		125,305
Station and Vehicle Privileges		171,904
Other Revenue		68,412
Total Revenues		$39,407,286
Operating Revenue Deductions:		
Operating Expenses	$34,367,584	
Taxes, Other than Income Taxes	1,303,702	
Depreciation	2,475,154	
Amortization of Acquisition Adjustment	(194,516)	
Total Deductions		37,951,924
Net Operating Income		$ 1,455,362

Since this will enable the company to meet its operating expenses and interest cost, as found to exist in Order No. 880, we find these fares to be just, reasonable, and non-discriminatory.

A subsidiary question remains for discussion. The token and cash fare in the District are now identical. This raises the possibility that we should simply eliminate the token and have cash fares only. The company suggested that we take this action. Having considered the question, we have concluded that we will require the continued sale of tokens with the existing system of sales outlets for a further period of time. With the exact fare system now in effect, it may be that riders will still find the use of tokens convenient. If they do so in significant numbers, we think that tokens should be available to them. The best way to find out the wishes of the public is to leave the token available and see what level of usage develops. If that usage drops to insignificant levels, which do not justify the cost of token distribution, we will consider the elimination of the token altogether. Hence, for now, we will authorize the sale of tokens at four for $1.20.

Finally, there is the question of the treatment of outstanding tokens. We believe, as in the past, that the most equitable treatment is to allow tokens now outstanding to be used without further payment.

One procedural point requires disposition. On December 19, 1968, the day of the hearing which preceded the entry of this order, a Petition to Intervene was filed by Mr. Sanford Schamus. The Petition was reviewed by the Chairman of the Commission, then presiding at the hearing, and brief oral argument was heard thereon at the hearing. The Chairman ruled that the petitioner had made no showing of standing which would justify authorizing his intervention. Petitioner asked that this issue be ruled on by the full Commission. The full Commis-

sion has reviewed the Petition to Intervene and the transcript of the oral argument thereon. It is clear that petitioner has made no showing which would justify his intervention. The only ground on which he appears to rely is his status as a taxpayer. He is not a resident of this community, does not allege that he has ever used D. C. Transit service, and the source of his interest remains somewhat obscure. We affirm the ruling of the Commission's Chairman made on December 19, 1968, that no showing of standing has been made and that the Petition to Intervene should be denied.

FINDINGS OF FACT

The findings of the Commission are set out in the foregoing opinion.

CONCLUSIONS OF LAW:

For the reasons set out in the foregoing opinion, we conclude, as a matter of law:

1. That the existing fare structure of D. C. Transit System, Inc., is unjust and unreasonable in that it will not produce revenues sufficient to cover the operating expenses and interest cost which, in Order No. 880, we found that the company would incur.
2. That the fare structure authorized herein, as set forth in Appendix A hereto, is just, reasonable and not unduly discriminatory in that it will produce revenues sufficient to cover the operating expenses and interest cost which, in Order No. 880, we found that the company would incur.
3. That it is just and reasonable that the company receive no return on equity while the

Commission considers the questions regarding the riders' fund raised by the court of appeals decision in *Williams* v. *WMATC*, decided October 18, 1968.

THEREFORE, IT IS ORDERED:

1. That D. C. Transit System, Inc., be, and is hereby, authorized to file tariffs on December 23, 1968, to become effective at 4:00 A.M., December 24, 1968, reflecting the fares prescribed hereinabove and as set forth in the Appendix attached hereto and made a part hereof.
2. That tokens outstanding on December 24, 1968, shall be honored as though purchased at the new rate prescribed herein.
3. That the Commission shall retain jurisdiction in this proceeding, with the power to make such further adjustments in fares as appear necessary in light of subsequent events.
4. The Petition to Intervene, filed by Sanford L. Schamus on December 19, 1968, be, and it is hereby, denied.

BY DIRECTION OF THE COMMISSION

GEORGE A. AVERY
Chairman

APPENDIX A
ORDER NO. 900

	Fares in Effect Prior to This Order	Fares Authorized Herein
District of Columbia		
Cash	$.30	$.30
Token	.26¼(4/1.05)	.30(4/1.20)
Interline	.35 + 5¢	.35 + 10¢
Capitol Hill Express	.65(a)	.65(a)
Minibus	.10	.10
School	.10	.10
Transfer	Free	Free
Maryland		
Intrastate Local		
Zones 1	.30	.30
2	.30	.30
3	.40	.45
4	.45	.50
5	.50	.55
6	.55	.60
7	.60	.65
8	.65	.70
9	.70	.75
10	.75	.80
11	.80	.85
12	.85	.90
Interstate Local		
Zones 1	.40(b)	.45(b)
2	.50(b)	.55(b)
3	.60(b)	.65(b)
4	.70(b)	.75(b)
5	.75(b)	.80(b)
6	.80(b)	.85(b)
7	.85(b)	.90(b)
8	.90(b)	.95(b)
9	.95(b)	1.00(b)
10	1.00(b)	1.05(b)
11	1.05(b)	1.10(b)
12	1.10(b)	1.15(b)

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION WASHINGTON, D.C.

ORDER NO. 984

IN THE MATTER OF:	Served October 24, 1969
Application of D. C. Transit System, Inc., for Authority to Increase Fares.	Application No. 573
Application of D. C. Transit for Suspension of the Program for the Purchase of New Buses.	Application No. 553 Docket No. 201

APPEARANCES:

HARVEY M. SPEAR, MANUEL J. DAVIS, BERT DEUTSCH, and *LEON SPOLIANSKY,* appearing on behalf of D. C. Transit System, Inc., applicant.

HUBERT B. PAIR, GEORGE F. DONNELLA, and *C. BELDEN WHITE,* appearing on behalf of the Government of the District of Columbia, protestant.

MISS DIANA KEARNY POWELL, appearing on behalf of herself as a protestant.

MRS. PATRICIA WALD, appearing on behalf of Citywide Welfare Rights Organization, protestant.

JOEL YOHALEM, appearing on behalf of himself as a protestant.

PETER PARKER, appearing on behalf of the State of Maryland, protestant.

ALFRED S. TRASK, appearing on behalf of the D. C. Association of Civic Organizations, protestant.

MALAKU J. STEEN, appearing on behalf of himself and supported by the Greater Washington, D. C. Area Council of Senior Citizens, protestants.

WILLIAM STALEY and *ROGER W. TITUS,* appearing on behalf of the City of Rockville, Maryland, intervenor-protestant.

DOUGLAS N. SCHNEIDER, JR., General Counsel, Washington Metropolitan Area Transit Commission.

BEFORE GEORGE A. AVERY, CHAIRMAN, AND WILLIAM O. DOUB, VICE CHAIRMAN.

I

THE PROCEDURAL BACKGROUND

On May 29, 1969, D. C. Transit System, Inc., (Transit) filed with the Commission an Application in Support of Change in Schedule of Fares. The application was accompanied by a revised schedule of fares, set out in WMATC Tariff No. 41, to be effective June 28, 1969. At the same time, Transit filed testimony and exhibits as required by Commission Regulation 56-01(c).

The application and tariff, as revised, proposed the following changes in fares:

1. Cash fare of 35¢ for regular route service within the District of Columbia (presently 30¢).
2. Five tokens for $1.60 for regular route service within the District of Columbia (presently 4 for $1.20).
3. Cash fare of 70¢ for Capitol Hill Express Service or 38¢ cash fare and a valid D. C. Transit transfer or one token (presently 65¢).
4. D. C. Downtowner (Minibus) cash fare of 15¢ (presently 10¢).
5. Maryland local intrastate service:

   35¢ cash fare for the first two zones of carriage, or any part thereof (presently 30¢).
6. Maryland-District of Columbia local interstate service:

   50¢ cash fare for regular route service within the District of Columbia and the first zone of carriage, or any part thereof, in Maryland (presently 45¢).
7. Maryland-District of Columbia express interstate service:

   55¢ cash fare (or 23¢ cash fare and a valid D. C. Transit transfer or one token) between the District

of Columbia and the Maryland-District of Columbia Line (presently 45¢).

The Commission received 14 protests against the revised rate schedule. On June 27, 1969, we issued Order No. 958 suspending the revised tariff and setting a date for public hearing on the matter.

On July 23, 1969, in Order No. 968, we consolidated the rate application for hearing purposes with an earlier application of Transit seeking suspension of the program for the purchase of new buses. The issues raised by the two applications were, in our judgment, interdependent.

Notice of the hearings was given in accordance with Commission Rules and Regulations. It commenced July 28, 1969, with the Government of the District of Columbia; Diana K. Powell, pro se; Citywide Welfare Rights Organization; Joel Yohalem, pro se; the People's Counsel of the State of Maryland; D. C. Federation of Civic Associations, Inc.; Malaku J. Steen, pro se; and the City of Rockville, intervenor, appearing as protestants. In addition to six sessions of formal hearings, two evening hearings were held, one in the District of Columbia and one in Maryland, in order to encourage public comment, and sixteen persons entered appearances and spoke on the issues involved.

When the formal proceedings ended on September 24, 1969, the official transcript included 1,410 pages of testimony and 75 exhibits. In support of its applications, Transit had presented testimony by Senior Vice President J. Godfrey Butler; Vice President and Comptroller Samuel O. Hatfield; and Vice President George P. Keyser. It had also offered the testimony of independent consultants John F. Curtin as an expert on rate of return, and George D. Hollander as an expert on cost-of-living trends, and through the Commission's subpoena power, had caused William A. Boleyn, Acting Deputy Director of the General Government Manage-

ment Division of the Bureau of the Budget, and Jackson Graham, General Manager of the Washington Metropolitan Area Transit Authority to appear.

Staff members Charles W. Overhouse, Chief Engineer; Richard C. Kirtley, Chief Auditor; and Sheldon A. Kinbar, Urban Transit Planner gave testimony, and the staff also presented independent consultants Robert L. Banks and George B. Dutton to testify on the subject of rate of return.

All but two of the formal protestants either made a statement or proffered evidence.[1] Mayor Walter E. Washington appeared for protestant District of Columbia and intervenor City of Rockville presented the testimony of its Director of Planning, Robert W. Lanham.

On September 25, 1969, Order No. 979 was issued, further suspending the tariffs until October 24, 1969.

II

PROJECTED FINANCIAL RESULTS

A. The Historical Period

Both the company and the Commission staff used the 12-month period ended February 28, 1969, as the historical year upon which to base forecasts for the future annual period. The company reported a net operating loss for the period of $114,916. The Commission staff, after thorough audit, made adjustments which had the net effect of reducing operating costs by $92,441,[2] so that the net operating loss for the historical period stood at $25,950. As the adjustments by the staff were not

[1] The two were Joel Yohalem and Malaku J. Steen.

[2] The major adjustments made by the staff were a $29,000 correction of depreciation expense and a $32,000 adjustment for three salaried personnel whose cost should have been allocated to non-transit operations.

challenged or rebutted, the figures presented by the staff in its Exhibit No. 3 will be accepted as the base for forecasting the operating results of the future annual period. Accordingly, we find that the operating results for the 12 months ended February 28, 1969, were:

TABLE I

	12 Months Ended February 28, 1969 Adjusted
Operating Revenues:	
Passenger	$32,973,938
Schoolfare Subsidy	779,773
Charter	1,875,355
Government Contracts	119,223
Station and Vehicle	144,867
Other	44,466
Total	$35,937,582
Operating Revenue Deductions:	
Operating Expenses	$32,501,566
Taxes, Other Than Income Taxes	1,175,983
Income Taxes	17,419
Depreciation	2,463,080
Amortization of Acquisition Adjustment	(194,516)
Total Operating Revenue Deductions	$35,963,532
Net Operating Income (Loss)	(25,950)
Operating Ratio	100.07%
Rate of Return on Operating Revenues	(0.07%)

In addition to this operating loss, of course, the company incurred interest expense of $1,286,987 in the historical period, making a total loss, from the owners' standpoint, of $1,312,937.

The statement in Table I includes a credit of $194,516 for amortization of the acquisition adjustment account. Order No. 981 of this Commission, issued October 17, 1969, established a corrected schedule for the amortization of the acquisition adjustment retroactive to January 1, 1964; that order directed that a book entry be made

correcting the status of the acquisition adjustment through December 31, 1968. It also directed the company to begin the new schedule of monthly amortization retroactive to January 1, 1969. Accordingly, the historical operating statement in Table I would more accurately reflect the company's operating results for regulatory purposes if the new amount for acquisition adjustment were shown. The corrected figure would be $345,666. There is no need to utilize the corrected figure in reporting the historical results. In forecasting operating results for the future annual period, however, the new amortization figures for the future annual period will be computed directly on the basis of the methodology adopted in Order No. 981.

B. Revenues and Expenses – At Present Fares

Our next task is to forecast the company's operating results in a future annual period if fares are maintained at their present levels. On this subject, there are issues in dispute between the company and the staff.

The company presented a projection for the 12 months ending June 30, 1970. It forecasted an increase of $3,108,000 in operating revenues and an increase of $3,628,000 in operating costs, resulting in a net operating *loss* for the period of $634,873, before interest charges.

The Commission staff presented its own projections, and its analysis indicated that there would be a net operating *income* of $332,027 in the same period. The issues thus raised must be disposed of by us and we turn first to the question of revenues.

1. *Disputed Items of Revenue* – There was, first, disagreement as to the amount of passenger revenues which would be forthcoming in the future annual period. The company initially projected the number of one-way rides in the future annual period at 116,661,255. It reached

this result by studying the number of rides in the various fare categories during the first quarter of the years 1965 through 1967 and establishing the relationship between the rides in the first quarter of the year and the total rides for the entire year. The ratio thus developed was applied to the actual first quarter rides for 1969 to produce an annualized figure. The Commission's engineering staff was of the opinion that ridership during the first quarter of 1969 was depressed, due to a number of general factors. The staff therefore adopted the same general procedure as that used by the company, except that they used as a base the actual rides for the second quarter of 1969 compared with second quarter ridership in the earlier years. This produced a projected number of one-way rides totaling 117,159,348. On rebuttal, the company witness recalculated his projection for the future annual period by utilizing the experience of the first six months of 1969 rather than the first quarter alone. This produced a revised figure of 116,924,259. Thus, as finally presented, the company projected 235,089 less riders than the staff.

We agree completely with the staff's attack on the company's original projection. Use of figures for one quarter, and particularly a quarter which tends to have low ridership, will produce a distorted result. However, as between the staff's analysis of the second quarter and the company's use on rebuttal of six month figures, we think the company's approach is preferable. It takes into account a longer period of time, thus providing a broader data base. We will, therefore, utilize the company's rebuttal projections in determining passenger revenues.

Company Exhibit No. 26, based upon the rebuttal estimate, projects passenger revenues at present fares to be $35,322,571. We also accept, as we logically must, the company's revised estimate of school fares, which produces a projected schoolfare subsidy of $1,507,060.

The only other disputed revenue item was the projection of charter revenues. The company initially projected revenues of $1,948,021, while the staff, analyzing the trend of past years, estimated that charter would produce $2,206,211. On rebuttal, the company witness detailed some specific guidelines which underlay his original estimate. He also revised his original estimate upward in order to give effect to increased rates which had recently been instituted by the company for its charter work. Thus, the company's final estimate of charter revenue was $2,000,932.[3]

This type of dispute is difficult to resolve. We are dealing essentially with opinions as to the course of future events. After careful consideration, we have decided to accept the company projection. It was made by the individual most directly involved in charter work and he based his result on direct knowledge of present conditions and present future conditions in the charter market. He has explained the basis for his reasoning and it is not without logic and reason. His forecasts have been accurate in the past.

The staff's methodology, based on trends, is a perfectly valid one and we might accept their approach in normal circumstances. However, the trends in the area of charter business were thrown off by the unfortunate events of 1968 and reliance on this data, even making allowance for these peculiarities, is tricky at best. We think that, in the present case, the wiser course is to use the company's somewhat more subjective but somewhat more directly derived figure.

2. *Disputed Items of Expense*—We come now to the differences encountered between the company and the

[3] The actual amount in dispute is not the $205,279 difference between the company and staff estimates. The staff recognized that the increased charter revenues would produce increased expenses. The actual net difference is $62,000.

staff in the projection of operating revenue deductions. The company projected operating expenses of $36,249,117, while the staff concluded that they would total $35,683,056. When the twelve months ended February 28, 1969, are compared with future annual period projections, the company's figures project an increase in operating expenses of $3,689,019, while the staff forecast an increase of only $3,181,489. The major portion of the projected increase is related to labor and labor-related items. The company projection places $3,428,685 in this category. This amount includes $2,843,941 in additional wage payments, some based on contractual wage adjustments through May 18, 1969, and some based on forecasted cost-of-living increases through June 28, 1970. This latter area, i.e., projected cost-of-living increases, was a subject of much discussion in this record. The company, in an effort to persuade us to modify our earlier stands on this subject, put into the record extensive evidence in support of its projections of cost-of-living increases beyond the date on which it filed its rate application, relying on the testimony of an independent economic analyst. The staff's projections were based on our previously expressed policy. Thus, Staff Exhibit Nos. 4 and 5 recognized all wage increases through June 29, 1969. Following the procedure we have established in past rate cases, the staff would also make an additional adjustment for the six-cent cost-of-living increase which went into effect on September 28, 1969.[4] This is expected to cost the company an additional sum of $258,620 by June 30, 1970. Thus, the staff would allow a total increase of $3,440,109. There still remains a difference between the staff and the company in the amount of $169,960 for projected cost-of-living increases

[4] The company had forecast a seven-cent increase for September 28, 1969, and had made its projections accordingly. The company figures must be adjusted to correct this error.

which, if the present labor contract were to continue, would take effect at the end of December 1969, March 1970, and June 1970.

We are squarely presented, therefore, with the need to determine whether to continue our past policy of recognizing only those cost-of-living increases which are required by conditions as of the date of our order. There can be no doubt that this policy has tended to underestimate the expenses which the company has actually incurred.

In recent times, and particularly during the last two years, the company has faced constant escalation of wages due to the cost-of-living clause. Therefore, we must consider very carefully the possibility that the additional cost-of-living wage adjustments forecast in Company Exhibit No. 3, in the amount of $169,960 will, in fact, materialize during the future annual period involved in this rate case. If we were to look only at past experience, we could be forced to conclude that these cost-of-living increases will actually occur. However, we are acutely aware that their occurrence, *vel non*, is dependent upon national and local economic conditions.

It seems to us that at present, and more so than at any recent time, it is impossible to predict with any certainty the future course of those conditions.

The newspapers, periodicals and journals coming to our attention on a daily basis contain a great number of discussions and predictions regarding the direction of the economy and the impact on the inflationary trend. Everything from continued boom to recession is predicted.

We are also aware, of course, of the Administration's efforts to control inflation. Paul W. McCracken, Chairman of the Council of Economic Advisors, and Arthur F. Burns, Presidential Councilor on Economic Matters, have both spoken of a slowdown in price increases and

a general easing of inflation by the end of 1969. The Administration has announced its determination to continue its present stringent fiscal and monetary policies to assure this result.

In short, we simply do not believe that at the present time, despite past experience, it would be a prudent course to assume the continuation of an upward trend in the cost of living. To engage in such conjecture is difficult at best, and at this juncture, it seems to us impossible, particularly in the context of striking a proper balance between investors and transit riders. We will not, therefore, allow the additional $169,960 projected by the company for future cost-of-living increases. We will, therefore, allow additional wage expense totaling $2,630,877.[5]

The next disputed expense item involves charter expense. The staff proposed an adjustment of $180,861 to reflect increased mileage for charter work. This adjustment was based on the staff's projection of higher charter revenues than those predicted by the company. We have decided to accept the company's revenue projection. See p. 7, *supra*. Thus, the staff's suggested figure will be reduced to $43,723, to agree with the company's revenue projection.

Next, the figure of $451,489 for pension contribution increases, as set out in the staff presentation, will be scaled upward to $477,351 in order to coincide with the adjustment in hourly wages made above. There was a question raised in this record as to allowing pension and health fund contributions in view of the fact that the company is in arrears in paying these items. The record indicates, however, that payments are currently being

[5] In other words, the adjustment made by the Commission staff on Exhibit No. 5, then, will be further adjusted by adding $258,620 to the hourly increase figure, representing the known six-cent increase on September 28, 1969.

made and there is no basis for concluding that they will not be made in the future annual period. We understand that arrangements are being made to provide collateral security for the arrearages. We find no basis for disallowing this expense.

The next item is the projection of salary increases for non-union personnel. The staff did not accept the company's projected increase of $135,429 because its payroll study for the preceding four calendar years disclosed that, despite annual increases granted to salaried employees, the total salaried payroll cost was actually decreasing each year, due to attrition, failure to replace senior officers as they retired, and replacing other employees, if at all, with persons at a lower wage level. The Commission accepts the stand of the staff on this matter. However, we also accept the data reported by the company in its rebuttal to the effect that a 15-cent-per-hour increase was granted to salaried employees on August 24, 1969. This increase will amount to $43,556 during the remainder of the future annual period and this sum will be allowed as an operating expense for that period.

This completes the discussion of disputed items of operating expense. As to certain increases, i.e., an item of $115,681 for track removal costs over and above the balance remaining in the track removal reserve and a minus adjustment of $34,499 for non-recurring and miscellaneous items, there was no dispute.

There are certain questions to be considered with respect to certain operating revenue deductions, other than operating expenses.

The first is the forecast for depreciation. For reasons discussed at p.20 *infra*, we have in fact decided to suspend the bus purchase requirement for the time being. The staff presented its opinion that, if the company is not going to be required to purchase 85 new buses each

year, the depreciation accrual basis should be changed to 17 years rather than the present 14. Depreciation has nonetheless been projected on the regular standard straight-line basis, including the depreciation of buses acquired since 1956 on a 14-year write-off basis (subject to salvage value of 4% of original cost).

No specific testimony was placed in the record establishing 17 years as the proper basis. The staff's engineer did introduce some raw data (Exhibit 1, Appendix S) showing the age of retired buses. However, a review of the engineer's listing shows that, for 1969, all bus retirements were the old "White" buses, none of the later model General Motors make. Testimony from the company indicated that there was doubt as to the longevity of the later model buses now in use by the company. There has been no firm experience as to the actual effective service life of the later model buses.

We note that the average age of the bus fleet of D. C. Transit at February 28, 1969, per company Exhibit No. 5, is 8.31 years, with 74.3% of the fleet air-conditioned. Under the circumstances, the Commission does not see that it does violence to regulatory theory or to accounting theory to permit the continuation of a 14-year depreciation rate during a suspension of the purchase program. The interests of the ratepayer are protected by the fact that the Commission has placed the company on a unit-cost basis for depreciation, so that whenever the depreciation accrual on a specific bus reaches 96% of the original purchase price, further accruals of depreciation on that unit cease.

It should be clearly understood, of course, that suspension of the bus purchase requirement has enabled us to refrain from increasing depreciation expense by $203,417 in the future annual period. This is the amount of added depreciation expense which would result from the bus purchase.

Next, an adjustment must be made to the amortization of the acquisition adjustment account. The figures presented on the record utilized the figure of $194,516 for this item, pursuant to the amortization practice established by Order No. 564. However, in Order No. 981, we have modified this amortization method in accordance with the opinion of the Court of Appeals in *Williams* v. *WMATC*, D. C. Cir. Docket No. 20,200 et al., decided October 8, 1968. Under the new amortization method, which is tied to accrual of depreciation on properties acquired by the company in 1956, the proper amortization amount for the future annual period is $173,339.

These, then, are the disputed items of revenues and expenses in the future annual period. Table II, below, reflects all of the adjustments mentioned above:

TABLE II

OPERATING STATEMENT
FUTURE ANNUAL PERIOD
ENDING JUNE 30, 1970 AT PRESENT FARES

Operating revenues:	
Passenger	$35,322,571
Schoolfare subsidy	1,507,060
Charter	2,000,932
Government contracts	123,784
Station and vehicle	144,867
Other	44,466
Total	$39,143,680
Operating revenue deductions:	
Operating expenses	$35,873,955
Taxes, other than income taxes	1,254,681
Income taxes	13,500
Depreciation	2,351,080
Amortization of acquisition adjustment	(173,339)
Total operating revenue deductions	$39,319,877
Net operating income (Loss)	$ (176,197)

Thus, if Transit's fares are not raised, the company will experience a net operating loss during the future annual period of $176,197. After meeting interest charges of $1,196,926[6] the total loss for the period will stand at $1,373,123.

A financial picture of this nature calls for action adjusting the fare structure to furnish the company with revenues sufficient to meet its operating expenses and provide a fair return. The next step in our deliberations is to consider the level of return which we should allow.[7]

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[6] Per Co. rebuttal, Exh. 35

[7] Issues have been raised in this proceeding on the question whether we should provide any fare increase despite a showing of losses under the present fare structure. Those issues are dealt with in detail at pp. 24–32 *infra*. We continue with a standard analysis here for the sake of continuity.

C. The Return To Be Allowed

In three recent orders relating to fare levels for Transit, we have discussed the principles to be applied in a determination of the return to be allowed. (Orders 684, 773 and 880.) As we noted in Order No. 880, the return must be one that will enable Transit "to cover interest on its debt, pay dividends sufficient to continue to attract investors, and retain a sufficient surplus to permit it to finance down payments on new equipment and generally to provide both the form and substance of financial strength and stability." *D. C. Transit System, Inc.* v. *WMATC,* 350 F2d 753 at 778 (D. C. Cir. 1965). In a determination of what amount of return will allow the company to achieve these general goals, we must consider such matters.

> ". . . as the capital programs in prospect, what such programs entail in terms of down-payments as well as financing, the cost of borrowing money, working capital needs, the desirable ratio of debt to equity, the incentives required by a stockholder to keep his money in the business and the dividends and growth rates requisite to supply these incentives, the opportunities in these respects provided in comparable businesses, and [the] related matters. . ." *D. C. Transit System, Inc.* v. *WMATC, supra,* 350 F2d at 779.

As it has in other recent rate cases, Transit presented the testimony of Mr. John F. Curtin on the subject of rate of return. Mr. Curtin is a member of the firm of Simpson and Curtin, a transportation consulting firm. The staff presented the testimony of Mr. Robert L. Banks and Mr. George B. Dutton, Jr., President and Senior Associate, respectively, of the firm of R. L. Banks and Associates, Inc., consulting transportation economists.

1. *Testimony of John F. Curtin*—Mr. Curtin's testimony followed the same pattern of his earlier presentations to the Commission and he used much of the same material he had presented on those earlier occasions.

He recommended a return of $2,700,000 to Transit. He stated that in arriving at that sum, he was guided by the concept that a fair rate of return requires consideration of the amount needed by Transit to safeguard its service, to attract capital and to provide sufficient income, over and above operating expenses, to ensure the financial soundness of the company, after giving due consideration to the inherent differences between this business and other utilities, as well as other industries generally.

He then discussed various factors which, in his judgment, distinguished the transit industry from other utilities and from unregulated industries, insofar as its risk attributes and its attractiveness to investors are concerned. He included such factors as automobile competition, labor costs, absence of natural growth, identification with low-income areas, inelasticity of costs, the absence of opportunities for labor savings, Federal aid for highways and public assistance to competing transit facilities. He concluded that these factors make the transit industry more risky than other industries, thereby causing transit securities to be more speculative.

Mr. Curtin's data included tabulations showing the operating ratios of (a) public utilities serving the Washington Metropolitan Area, (b) railroads serving the entire country, and (c) a group of six privately-owned transit systems. The witness testified that Transit is a typical transit utility because its characteristics are quite similar to most other transit companies; the similarity includes trend of patronage, population density, and in the relative degree of use of transit by the community.

He emphasized the narrow degree of margin between revenues and expenses of Transit as compared to other utilities, by portraying the operating ratio of D. C. Transit for corresponding years. He emphasized that this comparison illustrates how little margin Transit has to withstand various economic impacts, such as a 5% increase in expenses, in comparison with other utilities.

He discussed the risks inherent in the transit business from the long-term viewpoint, and discussed the long-term growth of public utilities. He noted that the company's passenger volume had declined 3 percent in 1967 and 7 percent in 1968, more than the decline in those years for the industry overall. He contrasted the passenger decline for Transit with what he noted was a strong growth trend existing among other major utilities in the metropolitan area.

Mr. Curtin presented a comparative analysis of the quality of public utility bonds and notes, comparing Transit with other utilities. In addition, he presented a summary of profits and dividends paid by large public utility corporations during 1967, for comparative purposes. Mr. Curtin also presented a comparative analysis of the company with other transit systems insofar as their basic market characteristics are concerned, indicating that Washington is reasonably representative of the major metropolitan areas in this country in terms of population density—both in the city itself and in the surrounding metropolitan area.

The witness presented a tabulation of Transit's operating revenues, operating costs, wages and salaries, and miles of service for the years 1961 through 1968, discussing and analyzing their trends. He made a comparison of labor costs between Transit and the rest of the transit industry. He presented an analysis of the comparative cost of capital among various public utility groups for 1967, including electric, gas, telephone, wa-

ter and transit. He tabulated the cost of debt and equity capital among those public utility groups, again in 1967, and gave his analysis of the tabulation. Mr. Curtin concluded from this analysis that where other utility groups yield between 5.5% and 6.7% to their investors, the transit industry is required to return up to 40 percent higher.

As a basis for his conclusion that the return to Transit should be $2,700,000, Mr. Curtin named three conditions. First, he asserted that a rate of return on the fair value of the system is warranted by the risk factors in the transit industry, which he said were at least as great in Washington as in other large cities. He estimated the rate base to be $25,784,096; adding that the $2,700,000 recommended return is equal to 10.5 percent of that rate base. Second, the "short-term risk exposure" to such things as weather, unusual local events and changing local circumstances, makes desirable an operating ratio of 92.0 to 92.5 in order to give reasonable assurance that services will be operated and expanded to meet community needs. Third, he cited the need to provide adequate coverage on Transit's debt. Mr. Curtin also reviewed the various elements for consideration in determination of return which the court had mentioned in the case we quoted at the outset of this discussion, indicating how those elements had been considered in his analysis.

In concluding, Mr. Curtin summarized the manner in which the recommended return of $2,700,000 would be distributed among debt and equity: $1,279,000 would go for interest on debt; $500,000 for dividends on stock; and $921,000 for down payments on buses and/or to retained earnings.

2. *The Testimony of Robert L. Banks and George B. Dutton, Jr.* – Mr. Banks testified as to the underlying general concepts which shaped the approach that his firm took to the question of rate of return. Mr. Dutton

then provided the detailed analysis and the specific conclusions with respect to amount of return which follows from an application of those general precepts to D. C. Transit.

Mr. Banks reviewed the requirements of the Compact and the relationship of changing circumstances to the question of proper return, noting that what constitutes a fair rate of return varies over time and varies with changing circumstances. He asserted that the changing circumstances in the Washington area are reflected in the establishment of the Washington Metropolitan Area Transit Authority charged with the construction of an area-wide rapid transit system.

Changing circumstances further will result in private enterprise playing a lesser role in transit operations in Washington in the future, he believes. Furthermore, he feels that a restructuring of bus service in the Metropolitan District is inevitable as the rapid transit system is placed in operation. He believes that proper long-term solutions for public transit in Washington will involve common management of bus and rapid transit. These and other indications lead him to the conclusion that in time the buses now operated by Transit will one day be publicly operated. Hence, Transit, in his view, must be regarded as an "impermanent carrier."

In explaining his approach to the return issue in the case of an "impermanent carrier," he conceded that the Commission has no proper choice but to allow a return sufficient to cover debt service. In addition, he recommended that the safety of the debt service be assured by the establishment of a contingency fund, about which more will be said when we discuss Mr. Dutton's testimony. Most of the conventional tests of return are inappropriate when applied to an "impermanent carrier," he said, because they comprehend the attraction of capital

and comparability with other firms, tests which assume permanence, according to Mr. Banks.

Mr. Banks further asserts that in his view the Commission has already discharged its obligation to the carrier to afford it the opportunity of earning such return as to make it attractive to private investors. He pointed out that through December 1968, Transit had produced a dividend payout for its shareholders of 13 percent per year on average equity. Even if Transit earned no more for its shareholders from current operations, the shareholders can expect further returns from unrealized appreciation on the company's real property. However, he conceded that the public interest requires that Transit be given a return on equity adequate to finance such new buses as the Commission may require Transit to purchase. In addition, the company requires an incentive for efficient operation during the corporate life remaining to it. He would provide that incentive through the contingency fund.

Mr. Dutton began his testimony with a discussion of the principles governing return. He enumerated the purposes of return as follows: (1) to pay interest; (2) to attract and furnish needed equity capital; (3) to compensate investors for equity capital previously furnished; and (4) to provide for contingencies. He emphasized that the level of return is related to both the risk that returns and dividends may decrease or disappear and the risk that the value of the original investment may be lost. He further asserted that a fair rate of return may not be only designed by prospective application as in the usual ratemaking situation, but may also be determined retrospectively to have been earned. Finally, he observed that principles of return must be applied in the context of the situation of transit in general, and D. C. Transit in particular.

He then turned to his analysis of transit generally, and of D. C. Transit in particular. He pointed out that transit patronage and service has declined and concluded that there is no support to the contention that a continuous infusion of new capital in the transit industry is required to keep up with the demand. He contended that the capital requirements of D. C. Transit have not been increasing like those of other public utilities, because, while other utilities have expanded plant on a large scale, Transit, by contrast, has purchased new buses only as replacements, and its fleet size has not grown.

He also referred to the nationwide trend toward public operation of city transit systems. He noted that the equity holders in companies that have gone to public ownership had generally fared well in that process. He predicted that the trend to public operation will continue due to the continued, indeed increased, need for adequate, low-priced service and the increasing inability of private enterprise to provide it, albeit for reasons not necessarily attributable to the management of those enterprises. D. C. Transit, he believes, will not be an exception to that trend.

Thus, in Mr. Dutton's view, with no foreseeable prospect for growth in ridership, with coordinated subway-bus operation requiring 10 percent fewer buses than at present, and with the prospect of public ownership, D. C. Transit does not need to provide for expansion or renewal of its facilities for the long future period.

On the issue of dividend payout and return, he points out that Transit's net income has provided in excess of a ten percent return per year on average equity through December 31, 1968. Dividends have yielded 13 percent per year on average equity and 70 percent per year on stockholders' original investment. During the same period, the return on gross revenue ranged from a maxi-

mum of 6.5 percent in 1963 to a loss of 0.7 percent in 1968, the mean being 3.5 percent.

These results led him to conclude that it would be reasonable not to provide a guaranteed return on equity for the future. Mr. Dutton concluded that an appropriate return for Transit would include an amount sufficient to pay interest on debt, to provide for down-payments on new buses, and to provide for contingencies. Contingencies would be provided for by the establishment of a special bank account into which earnings in excess of interest payments would be deposited. The contingency account would be drawn upon, with the permission of the Commission, whenever revenues failed to cover expenses and interest. The accumulation of money in the contingency account over a period of two or three profitable years would make it possible to allow a smaller margin in subsequent years. Then, after the account had accumulated to a safe level, the Commission could relax the requirement that all return above interest be deposited in the account. Thus, according to Mr. Dutton, there would be an incentive to earn profit.

He recommended that the return for Transit for the year ending June 1970, be: $1,216,616 for interest payments, and $293,384 for contingencies and equity incentive, for a total of $1,510,000. This return is approximately 3.7 percent of the revenues, or 6.1 percent on rate base. He further recommended that this return amount be increased to cover any increases in interest requirements, and any downpayments on new buses, if the Commission ordered the continuation of the bus-purchase program.

3. *Conclusions on Rate of Return*—We face once again a determination as to the proper rate of return for Transit. We have considered the same issue in recent years in our Orders Nos. 684, 773, and 880. We have

had the benefit of Mr. Curtin's analysis on behalf of the company in connection with Orders Nos. 773 and 880, as well as the present proceeding. The staff has provided us with the testimony of Messrs. Roberts (No. 684), Kosh (No. 773 and 880), and Banks and Dutton (the present proceeding). One of our determinations—that of our Order No. 684—has been reviewed and upheld by the court of appeals. We mention these facts in order to emphasize that we do not come to our consideration of this important issue in a vacuum. We decide the issue here, of course, on the basis of the record developed in this proceeding, but we bring to our deliberations on that record the experience of several recent endeavors along precisely the same lines.

This fact is particularly interesting to us because we find in this record that the staff's independent consultants on the subject of return have reached a conclusion, by a markedly different route, which is substantially the same as that produced by our own analysis on three past occasions. In Orders Nos. 684, 773, and 880, we reached independent conclusions that Transit's return should be on a certain general level. It should cover legitimate interest expense, of course. Over and above that amount, we have allowed a dollar return on equity in the neighborhood of $750,000, No. 684, p. 30; No. 773, p. 56; No. 880, p. 50. In the present proceeding, Messrs. Banks and Dutton have engaged in a severe and critical analysis of Transit's capital cost requirements. They have made recommendations as to the treatment of the return issue which can only be considered radical when considered in terms of the standard or classic analysis of this issue. Yet, they have made a recommendation as to a level of return over and above operating expenses and interest which is substantially identical with the amount allowed in our earlier orders. Thus, they would allow rates which provide $293,384 over and

above interest as a "contingency and equity incentive." To this, they would add the amount needed to make down payments on required bus purchases. For an 85 bus purchase, which was the assumption underlying our earlier rate orders, this would amount to $593,300 making the total return which Messrs. Banks and Dutton would allow amount to $2,103,300. This is roughly the same amount, albeit a little higher, that we allowed in our earlier orders.

We think it appropriate, therefore, to consider the adequacy of that amount in light of the applicable tests laid down by the courts and in light of the facts developed on this record.[8]

We begin by examining the adequacy of a return at the level recommended by the staff witnesses. We must first determine, obviously, what that dollar amount would be. Messrs. Banks and Dutton would allow $293,384 to cover contingencies and provide an equity incentive. To this amount, they would add a sum sufficient to cover down payments on new bus purchases. For 85 new buses, this would amount to $593,300. In view of our decision that the bus purchase requirement will be suspended, it might be argued that this entire

[8] Mr. Curtin recommended a return of $2,700,000, providing a return on equity of $1,421,000. Mr. Curtin's approach and analysis were essentially the same as expressed in his testimony in the proceedings which led to Orders Nos. 773 and 880. We have had occasion to analyze his approach thoroughly and at length in earlier orders. See Order No. 773, pp. 45-51. We will not repeat that entire analysis here. It is sufficient to note that Mr. Curtin did not take into account the effect upon risk of Transit's real estate prospects. He based his recommendation upon a comparison of *average* returns on rate base and operating revenues of a group of other transit companies, ignoring the experience of individual companies within the group. He relied on a required coverage of debt service, ignoring Transit's unusual capital structure. He assumed a required payment of $500,000 in dividends and he treated down payment on buses and growth in retained earnings as separate items. All of these aspects of Mr. Curtin's analysis cause us to doubt its validity and, as in our other orders, we will not rely on his approach here.

amount should be eliminated from the return. Thus, to determine the dollar return which the consultants would allow, we must determine the impact upon the return element of our decision to suspend the bus purchase requirement.

First, we emphasize that our action on bus purchases is limited merely to suspending the *requirement* of bus purchases. We will still expect the company to maintain the quality of its fleet at an adequate level and to make bus purchases as necessary to accomplish that end. Further, even if bus purchases are reduced from the levels which we had been requiring, we think that the company should have some internally generated capital built up to sustain future purchases. Indeed, the adverse impact of the company's financial difficulties of recent years makes some buildup of capital from internal sources imperative. Hence, we will not reduce the required return by the entire amount which would be used as a down payment on 85 new buses. However, in recognition of the fact that we are easing the capital requirements of the company, we will reduce the return by $386,684, leaving a return to the equity holder of $500,000. In our judgment, this adjustment will provide the company with sufficient growth of internally generated capital to maintain, for the time being, the curtailed bus purchase program we contemplate. Thus adjusting the return which the staff consultants would recommend, we are led to examine the adequacy of a net operating income amounting to $1,696,926.

This would provide a return on system rate base of about 6.88%. The return on capitalization of Transit as of May 31, 1969, would be 7.91% (on long-term debt and stockholders' equity per Staff Exhibit No. 11).

The net income available to equity as of May 31, 1969, would be 38.54%. This figure, looked at in isolation, appears high. However, we are mindful of the fact that the

losses which the company has suffered in the past few years have reduced retained earnings considerably. The return on equity must be considered in light of this fact. If we simply reduced the dollar return by dint of the percentage return on equity, the company's losses would place it in an ever downward spiral. As previously mentioned, we think that the company is now in serious need for growth in its internally generated capital. Hence, we believe that the return on equity is reasonable.

This level of return must also be measured by the criteria set forth by the court of appeals. As previously noted, the company will pay interest expense of $1,196,926 out of a total return of $1,696,926, which would leave $500,000 as a return for the equity holder. This amount must be adequate "to pay dividends sufficient to attract investors, and retain a sufficient surplus to permit it to finance new equipment and generally to provide both the form and substance of financial strength and stability." *D.C. Transit System, Inc.* v. *WMATC,* 350 F2d 753,778 (D.C. Cir. 1965). In our judgment, these standards would be met. A return of $500,000 would permit the payment of dividends at a level consistent with current stockholder equity if management so decided. We suspect, however, that, for the time being, management will choose to emphasize the need for retained earnings in order to build up equity and improve cash working capital. These choices are within the province of management. We are sure that the amount we are considering would not be excessive by any standard and would be adequate in terms of the company's overall financial needs and the present level of its equity capital. Retained earnings have reached a very low level. While earnings at the level under consideration would permit a substantial growth in present levels when considered in percentage terms, the dollar growth is modest.

The return would be adequate to finance new equipment. We have eased the requirements for such purchases and the amount here discussed would reduce the amount allowed for such purposes accordingly. See pp. 19-20, *supra.*

To sum up on the subject of return, we have in this record the testimony of Mr. Curtin advocating a net operating income of $2,700,000. For reasons discussed not only in this order but on two earlier occasions we do not rely on Mr. Curtin's analysis. We also have the testimony of Messrs. Banks and Dutton. By a novel and critical method of reasoning, they have reached a conclusion as to the *amount* of return which we should allow which is substantially similar to the conclusions we have reached in three relatively recent opinions.[9] We have examined that level of return in light of current conditions as revealed in this record. We find that a downward adjustment in the levels earlier allowed is justified by our easing of the bus purchase requirement. With this adjustment, application of the standards and criteria set forth by the court of appeals leads to the conclusion that a return consistent with our allowance in earlier cases and with the recommendations of staff consultants in this proceeding is a just and reasonable return. Accordingly, we will allow a net operating income of about $1,700,000.

Before leaving this subject, we wish to point out that the thrust of our analysis of the staff consultants' recommendation has been to its end result. In reaching that result, the consultants espoused theories and views rarely heard in considering proper levels of return. They

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[9] We emphasize our understanding that we are looking, at the moment, only at the amount of return which the staff consultants would allow. The special treatment of that return which they recommend is another matter, but it has no immediate effect on the amount of money which must be produced through the fare box.

suggested that Transit needed no further return on equity because of its "impermanence," its prior earnings, and its declining patronage.

To us, the significant thing about the consultants' approach is that it led them to the same conclusions with regard to amount of return as has been reached by other analysts in other proceedings. We do not adopt their philosophy and views although we find them interesting and provocative. We believe that an incisive yet unconventional approach to this problem of rate of return determination, such as that provided us here by Messrs. Dutton and Banks, is extremely useful in enlightening a commission's perceptions of this extremely complex area. We have some doubts, however, as to the wisdom of the adoption of a policy along these lines by a regulatory commission. We believe that it would have adverse effects along two important lines. First, it would seriously damage the confidence of the financial community in this company and thus impair the company's ability to obtain further financing. Second, it would seriously impair the incentive of ownership and management to provide an adequate, much less a high quality of service.

For all these reasons, we rely only on the significant fact that their severely critical analysis led them to a conclusion consistent with our past determinations as to the proper level of return.

Having made this determination, we are in a position to reach some preliminary conclusions on revenue requirements. Table II, p.12, *supra,* indicates that in the future annual period under present fares, the company will incur an operating loss of $176,197. We must change fares sufficiently to make up this operating loss, to cover interest expense of $1,196,926 and to provide a return on equity of around $500,000. Thus, we must provide additional revenues in the future annual period of about

$1,870,000, so that operating revenues in that period will total about $41,100,000.

D. *Revenues and Expenses – Under Fares Proposed by Applicant.*

We first consider the projected operating results under the fare schedule proposed by applicant. The company, in its Exhibit No. 26, had assumed that one-half of intra-D.C. passengers would use the 32¢ token and the other half would pay the straight 35¢ fare proposed by applicant. The Commission might have accepted such a forecast if tokens were available for sale on the buses, but, because of the exact-fare system now in effect, it is obvious that substantially less than 50% of D.C. passengers will be able conveniently to purchase tokens. Staff Exhibit No. 1 showed the serious decline in token outlets from 382 in September 1968, to only 205 by June 1969, including a bare 4 outlets in all of Southwest Washington, 7 in Northeast, and 8 in the Southeast section of the city. The staff estimated that no more than 40% of D.C. passengers would be able to buy tokens. Based on that percentage, the following statement projects operating results for the future annual period, based on an assumption of a 60/40 cash token split, the remaining figures being those developed for Table II:

TABLE III

OPERATING STATEMENT FOR FUTURE ANNUAL PERIOD AT FARES PROPOSED BY APPLICANT (USING 60-40 CASH-TOKEN SPLIT)

Revenues			
Passenger			$38,493,888[10]
Schoolfare Subsidy			1,657,766
Charter			2,000,932
Government			123,784
Other			189,333
			$42,465,703
Operating Revenue Deductions			
Operating Expenses	$35,873,955		
Taxes, excluding income taxes	1,254,681		
Income Taxes	120,844		
Depreciation	2,351,080		
Acquisition Adjustment	(173,339)		
		$39,427,221	
Net Operating Income		$ 3,038,482	(7.16%)
Interest		(1,196,926)	
Net Income		$ 1,841,556	

The resulting net operating income of $3,038,482 is excessive. The return on equity would be more than three times that we have found to be just and reasonable. An excessive result is also reached if the revenues are recalculated on the basis of a 50-50 cash-token split,

[10] This figure contains a deduction of $10,300 for the Rockville zone adjustment. See p. 39, *infra*. In addition, following our past practice, we have disallowed an adjustment of $44,808 suggested by Transit on the basis that there are a substantial number of tokens outstanding which were sold for a price less than the 32-cent value for which they may now be used. We have made the same adjustment in the revenue figures used in Table IV, and the tables in footnotes 13 and 14.

as the company originally proposed. The return on that assumption would total $2,791,947, and the return on equity would be $1,595,021.

The Commission's task now is to find a suitable rate structure which will produce net operating income of approximately $1,700,000 so that return to the equity holders, after interest expense, nets out to about $500,000. Before reaching that question, however, we believe that this is the appropriate point at which to consider the question whether, despite the conclusions we have reached in considering projected revenues and expenses, we should simply deny any relief whatsoever.

III

EFFECT OF PENDING LEGISLATION

To review our conclusions briefly, the company sustained an operating loss of $25,950 and a loss including interest payments of $1,312,937 in the twelve months ending February 28, 1969. If fares are maintained at their present levels, the company will sustain an operating loss of $176,197 in the twelve months ending June 30, 1970. They will, in addition, have to pay interest expense of $1,196,926 in the same period, making a total loss of $1,373,123.

In the ordinary case, there would be nothing further to discuss on the subject of a need for action with regard to fares. The existence of the need would be obvious and the only further inquiry would concern the precise nature of the action to be taken. However, in this proceeding further questions as to the need for action have been raised and these questions merit our careful consideration.

The issue was most squarely presented to us by the testimony of the Honorable Walter E. Washington, Mayor-Commissioner of the District of Columbia. The

District Government had entered the proceedings as a formal protestant and their direct case consisted of Mayor Washington's testimony.

The Mayor stated his concern—a concern which closely parallels our own views expressed a year ago at pp. 3-18 of our Order No. 880—with the adverse impact upon social costs and sound transportation planning of further increases in transit fares. He pointed out that there is legislation pending in Congress which is addressed to this problem, specifically a bill authorizing public ownership of the transit system and providing for financial assistance to the company from public funds during the interim period while transfer to public ownership is being arranged. Because of the problems which fare increases cause, and because this legislation is pending in Congress, the Mayor urged us to deny the pending application for a fare increase.

We must, of course, evaluate the position the Mayor urges within the framework of the obligations imposed upon us by law and in the light of the responsibilities we bear for the health of the mass transit system which serves this community. Having thus considered the suggested course of action, we have reluctantly concluded that it is not a path down which we can go.

First, we do not think it is legally possible for us to do so. We have no control over the timing of an application for a rate increase. Transit may file such an application at any time that management desires. Once an application is filed, we have no power to delay our decision beyond 150 days from the date on which the application was filed. We have a statutory obligation to act within that time period. Otherwise, the fares proposed by the applicant automatically go into effect. When we do make our decision, we do not have unbridled power to make any disposition of the application which we see fit. Our decision must be based on a consideration of the facts of

record and on an application to those facts of the standards set out in the Compact and in the applicable case law. Hence, in the present proceeding, we *must* issue a decision by October 26, 1969. We *must* grant or deny that application on the basis of the facts presented to us and the provisions of the Compact and the applicable cases.

We know of nothing in either the Compact or the cases which would empower us to deny a rate increase when it has been shown as it has in this record, that the present fares will not even cover the company's operating expenses during the future annual period. The Compact explicitly requires not only that the company receive revenues sufficient to cover expenses but that it "be afforded the opportunity of earning such return as to make the carriers attractive investments to private investors." Compact, Article XII, Section 6(a)(4). Apart from this statutory provision, it is a basic principle of regulatory law that a utility may not be required to operate at a loss. To do so is to confiscate its property without due process of law. *Bluefield Water Works and Improvements Co.* v. *West Virginia Public Service Commission,* 262 U.S. 679, 690 (1923). These provisions of law are binding upon us and we have no right to ignore them.

It is suggested, both in the Mayor's testimony and in the arguments of other protestants (most clearly and ably by Mrs. Wald of Neighborhood Legal Services, representing the Citywide Welfare Rights Organization that we can somehow avoid the requirements of Section 6(a)(4) of the Compact because of the provisions of Section 6(a)(3). That section reads as follows:

> "In the exercise of its power to prescribe just and reasonable fares and regulations and practices relating thereto, the Commission shall give due consideration, among other factors, to the inher-

> ent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."

We have considered this language carefully in this proceeding just as we have considered it in every past rate case. First, we think that this language must be read with Section 6(a)(4) to form a harmonious whole. Section 6(a)(4) imposes a flat, unequivocal obligation to cover expenses plus a fair return. There is nothing in Section 6(a)(3) which relieves us of that obligation on the basis of this record. Rather, it states that, in setting just and reasonable fares, we must give "due consideration" to certain factors.

Two of these factors themselves explicitly recognize the obligation to provide adequate revenues. Thus, we are to consider "the need, in the public interest, of adequate and efficient transportation service by such carriers *at the lowest cost consistent with the furnishing of such service.*" Compact, Article XII, Section 6(a)(3). Our attention is thus specifically directed to the concept that we must provide revenues sufficient to enable the carrier to provide service. Operations at a loss will certainly not meet that standard.

It is suggested that this language somehow enables us to control the timing of an increase even though the evidence shows that loss operations will result. We see no merit in such a claim. For one thing, it must be borne in mind that if we deny this application, and the company wishes to seek another increase, it would have to file a

new application in order to obtain an increase. All interested parties have full rights to participate in the new proceeding which would thus be started. These proceedings involve complex issues. Hence, a further period of 150 days, or five months, could well ensue before further action on fares was possible. Hence, losses could occur for a very substantial period if we accepted this theory. Such a result would not be consistent with the furnishing of service.

Moreover, even if we could control the timing of an increase on the basis of this language, it is a dubious proposition that we should delay at this time. The company operated at a substantial loss in 1967 and at an even greater loss in 1968. In 1969 to date, by our explicit order, its fare box revenues were sufficient only to permit it to operate at a break-even level. Faced now with the fact that further losses would result if fares are not increased, it is difficult to accept the proposition that this is an appropriate time for delay, if that were within our power.

The next clause of Section 6(a)(3) directs our attention to "the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service." Here is a direct admonition to provide revenues sufficient to cover expenses. No management can provide satisfactory service for long if it is losing money on its operations.

Recognizing this, the thrust of the argument made under this language is that Transit's management is not honest, economical, and efficient and that if it were, the revenues under present fares would be sufficient. However, there are no facts of record to support these contentions. We have discussed certain management deficiencies in this opinion and we will direct that certain changes be made. But these problems relate only to improving the company's performance with respect to

vehicle maintenance and scheduled service and neither our staff nor the protestants have presented facts indicating that the company's basic problems lie in inadequate management.

Indeed, it is crystal clear on this record that the financial problem of the company is due to a declining ridership trend and increasing labor costs. Much of the decline in ridership, it has been indicated, is due to conditions over which the company has no control whatever, namely, unrest in the city and the necessity for instituting a scrip system due to an enormous increase in bus robberies. The increasing labor costs stem from a cost-of-living clause in the labor contract which has had a heavy impact due to the steep inflation of recent years. We can find no basis in this record for saying that the need for additional revenues could be taken care of by a more honest, economical, and efficient management.

The third standard which Section 6(a)(3) requires us to consider is "the effect of rates upon the movement of traffic by the carrier . . . for which the rates are prescribed." It is pointed out that a fare increase causes a decrease in ridership, thus adversely affecting the "movement of traffic by the carrier." Hence, it is argued, application of this standard requires us to deny an increase. However, if this reasoning were valid, no increase in fares could ever be justified since they always cause some persons to stop riding the bus. We believe, rather, that this standard is addressed to the proper design of a rate structure and that it inherently recognizes the need for revenues sufficient to cover expenses.[11] In this connection, the Citywide Welfare Rights Organization suggests that, under this standard, the company has been deficient in failing to give a discounted rate in the off-peak hours, thus increasing ridership. However, this

[11] Without such rates, there would eventually be no "movement of traffic" at all.

contention overlooks the fact that this Commission has, in the recent past, considered the subject of discount fares, both as a general measure to increase ridership and as a desirable alternative for off-peak hours. See Orders Nos. 880 and 882.

For reasons fully discussed at pp. 15-18 of Order No. 880, issued October 18, 1968, we do not believe that a straight reduction in fares at all times, in the hope of increasing ridership, is a practicable solution to Transit's problems. There is no reasonable basis on which to expect an increase in ridership of sufficient magnitude that overall revenues would be increased.

As for fare reductions in off-peak hours, we considered that possibility in Order No. 882. It is an approach with some merit and we may yet take an opportunity to test it. However, our analysis of the conditions existing on this transit system at the time we considered the idea indicated that if such discounts were instituted, the peak-hour fare would have to be higher than it would with a straight fare applicable at all times. It further appeared that more people would be paying the peak-hour fare than the lower fare. In those circumstances, we judged that use of such a fare was not desirable. This is not to say that the matter should not be further considered as conditions change. If we were to have a basis for concluding that such a rate structure would be beneficial, we would try it out.[12] However, there is no basis in this record for concluding that such a structure would be desirable. In any event, it certainly cannot be said that the company's failure to institute such a system justified a denial of a fare increase at this time.

Under §6(a)(3) we must give due consideration, finally, "to the inherent advantages of transportation by such carriers" as Transit. Again, we find nothing in this

[12] We know that it has been tried in other cities and has not been considered a success.

standard which would justify this Commission in refusing to give Transit a rate structure which produces revenues sufficient to cover expenses. The inherent advantages of mass transit cannot be enjoyed long by anyone if the system is not allowed to be economically viable.

To sum up on the impact of §6(a)(3) of the Compact upon our consideration of the issues before us, we have pointed out the obligation imposed directly upon us by the unequivocal language of §6(a)(4) to provide revenues sufficient to cover expenses and provide a fair return. We then referred to the general principle of statutory construction that the various sections of a statute must be read and interpreted to form a harmonious whole. We then examined in detail each of the standards set out in Section 6(a)(3) and we find nothing in any of them which would justify us in overlooking the requirements of §6(a)(4) and making the company operate at a loss. We conclude, therefore, that in view of the facts of record here, we have no basis in the applicable law for adopting the Mayor's suggestion that we refuse an increase because of the pendency before Congress of legislation providing for public ownership and interim subsidy.

The argument to the contrary comes down to this: Pointing to the standards of §6(a)(3) and to the recognized fact that rate increases lead to decreased ridership, it is argued that such increases should only be granted if there is no other reasonable alternative. This is a proposition with which we fully agree. In this case, as in all others, we would not grant an increase if there were a reasonable alternative course of action open to us.

Our attention is directed in this connection to the alternatives of public ownership and interim subsidy in legislation presently pending before Congress. This, it is

said, is an alternative and "due consideration" of it requires that we deny any increase at this time. We should turn, therefore, to a direct consideration of this alternative.

One flaw in this reasoning is the fact that the legislation is not an *alternative* at the moment. Rather, it is a possibility that may or may not come to pass. From a legal standpoint, it would be a questionable course of action to rely on this possibility. We must act now—the statute requires us to. If the facts of record justify an increase now we may not deny that result simply because something might occur in the future which would avoid the existing need.

Of course, the more certain it is that circumstances will change, the stronger becomes the argument that we should take the possibility into account. In our judgment, however, the pending legislation can only be regarded as a possibility with no degree of certainty at this juncture. While bills have been introduced in both Houses of Congress, they have not reached the floor in either House. In the Senate, the public ownership with interim subsidy bill has been approved in Committee but it has not yet been reported to the floor. In the House, there have not even been hearings on the ownership proposal. We have no information, nor did the District Government in its testimony before us, as to the ultimate prospects for this legislation in either House. We certainly have no basis whatever for basing any action on the assumption that the proposals will be enacted into law.

Finally, in considering the suggestion that we simply withhold action at this time on the basis of pending legislation, we feel that we must take into account the company's present ability to continue operations in the face of operating loses. We have many obligations which the public interest requires us to protect. There is none

more important, however, than our obligation to ensure that this community has available to it the mass transit service on which it depends so heavily. The problems stemming from service deficiencies, and the problems stemming from higher fares, are as nothing compared to the problems with which we would have to deal if the buses simply stopped running.

Nor is this a remote and imaginative possibility. The rate of return witnesses engaged by our staff in this proceeding can hardly be considered as unduly favorably disposed toward the financial interests of the company's owners. They recommended a severe new approach toward rate of return determination. Yet each was asked about the possibility of simply requiring the company to operate at a loss and each rejected that possibility as highly unrealistic and potentially dangerous. Each referred to the recent experience of the city of Akron, Ohio. There, as we understand it, an operator was denied an increase and required to operate at a loss. The company's buses were seized by creditors and the operation was shut down. The city was deprived of transit service for more than four months. We cannot countenance any such similar experience here in the Washington area.

Of course, a company could be in a state of financial health which permitted it to sustain loss operations for some period of time. However, the facts here demonstrate that we have no such situation. This company has already sustained substantial losses in 1967 and 1968. It is operating only at a break-even level in 1969. Its current liabilities are 5.9 times in excess of its current assets. A company witness presented an analysis of cash flow. On the basis, thereof, the company witness made dire predictions that operations would simply have to cease very shortly without financial relief. We need not accept his conclusions and, indeed, we do not, as to the

timing of the impact on the company for further loss operations. Nonetheless, we think that the information on cash flow makes it clear that requiring the company to sustain further losses involves an unacceptable degree of risk to continuity of service.

We also accept the validity of the contention that further losses would make it difficult, if not impossible, for the company to rely on outside financing sources in order to weather a period of financial losses.

In short, we have considered the Mayor's suggestion that we refuse any further fare increases despite a showing of financial need. We reject, as did the Mayor, the alternatives of reductions in wage rates or cut-backs in service levels. We must also reject, albeit reluctantly, his suggestion that we simply withhold action on the basis of the public ownership legislation pending in Congress. We do not think that such a course of action is legally open to us. Even if it were, we do not think that eventual enactment of that legislation is sufficiently certain to justify our reliance on that result. Finally, we think that to withhold action in the face of the financial realities we have here found to exist involves an unacceptable degree of risk to the assured continuity of transit service.

This is not to say, however, that our actions in this proceeding have not been influenced by the Mayor's testimony and by the issues he raised. In response to a very legitimate concern with the social impact of rising fares, we have taken whatever steps we can to keep those increases to a minimum level. Most importantly, we have, for the time being, eased the requirement that the company remain on a rigid annual bus purchase program, thus reducing required annual revenues by $769,170. See pp. 43-44, *infra.*

Moreover, in the exercise of our judgment in those areas where such exercise is proper, we have opted for

those actions which will minimize the amount of increase. For instance, we feel that a thoroughly defensible case could have been made for giving Transit a fare increase much closer to the level it sought, i.e., a 35¢ cash fare and a 32¢ token fare. This company has just come thourgh a period of severe financial adversity. In two consecutive years, it has lost substantial sums; it is currently just breaking even. It faces problems with its creditors and has even at times had difficulty meeting its payroll. For a time, there was a threat of a work stoppage because of a dispute about arrearage in its payments to the union pension and health funds. If the special circumstances with which the Mayor's testimony dealt were not present, it would be a sound exercise of judgment to be a bit generous both in resolving disputes on projected expenses and in determining the proper return. An easing of stringency in these areas would enable the company to recover its financial health fully in a timely manner. However, we have not taken that course. We have applied a strict though fair standard to the resolution of disputes and we have restricted the return to the minimum defensible level. This approach has been taken in direct response to the problems with which both this Commission and the Mayor are concerned.

Finally, we wish to make it crystal clear in this opinion that we stand ready to respond as quickly and as expeditiously as can be done to any final enactment of legislation dealing with the problem of rising fares. If the Congress enacts legislation which permits a fare reduction, and if the President approves it, we will move with the utmost dispatch to reduce fares to whatever level is possible.

In summary, therefore, we have considered the Mayor's testimony fully and carefully. We share his concern with the problems caused by increasing fares and we applaud his efforts to deal with them. However, there

are insurmountable obstacles, both legal and practical, to adopting his suggestion that we deny a rate increase completely. Rather, we have kept that increase to the minimum level necessary to preserve the company's financial health. We stand ready to act as quickly as possible to reduce fares as soon as legislation making that feasible becomes effective.

IV

THE APPROPRIATE RATE STRUCTURE

It is clear, therefore, that the pending legislation on ownership and subsidy of Transit does not obviate the need to consider the question of appropriate changes in the rate structure in order to produce the revenues here found to be necessary. We begin our consideration with one more basic question: The impact on our deliberations of the court decision in *Payne* v. *WMATC* (D.C. Cir. 20,714, decided October 8, 1968) and our proceedings on remand of that decision.

Pursuant to that remand, we have engaged the services of independent consultants and they have undertaken a thorough investigation of the factors involved in obtaining a "fare structure that is rational, fair, and neither 'unduly preferential [n]or unduly discriminatory;'" *Payne,* slip opinion, p. 37.

The *Payne* case was remanded to the Commission in December 1968. On December 17, 1968, qualified independent consultants were requested to submit proposals on the fare discrimination study. Fifteen responses were received and analyzed by the staff, in the course of which there was consultation with consultants interested in performing the study. On April 8, 1969, Alan M. Voorhees and Associates, Inc., was retained. Their contract provided that they would complete the study and submit a report within five months. The final report is

not yet available, but the Commission staff has received a draft. It is expected that a final report will be submitted to the Commission in the near future. We anticipate holding public hearings within 30 or 40 days after that on the findings of the report as a means of assisting us in reaching the conclusions called for by the *Payne* remand.

The question which now arises is whether we should make any further adjustments in fares until the Voorhees study, and the proceedings in connection therewith, are completed. We considered this same question in Order No. 880 and we found our answer there, as we do here, in the court's holding in the *Payne* case. There, the court said:

> "[W]e do not view our holding in this regard as requiring that the rate increases ordered by the Commission be rescinded, and *we leave the matter of any immediate fare adjustments to the Commission's discretion*. . . . [W]e think the commission, balancing the possibility of unfairness to particular customers or classes of customers against the company's immediate need for increased revenues, might have *deferred consideration of the questions relating to discrimination while granting Transit's request for a fare increase.* And we hold that *it is within the Commission's discretion to follow that course on remand.*" *Payne* v. *WMATC*, slip opinion, pp. 37-38. [Emphasis supplied]

The study required by the *Payne* remand has been pressed diligently and very substantial progress has been made. We expect to have the consultant's final report and be ready for hearings in the near future. However, those proceedings cannot be held immediately and they may consume a considerable period when they do oc-

cur. Following the hearings, we wish to consider the evidence fully and carefully and render a well-considered opinion. Implementation of any action required might take some further time. In short, we cannot take action on the *Payne* remand now and we cannot predict with certainty when we can act. We are moving steadily toward action and it will not be an unduly long period before our consideration is complete. Meanwhile, however, we have a record that calls for fare adjustments now. We believe that the court's holding in the *Payne* case, as quoted above, permits us to take further action at this time.

Certain broad questions as to rate structure were raised in this proceeding, and before discussing the specific changes we will authorize by this order, these questions should be considered.

There is, first, the question of the interrelationship between fare levels in the District of Columbia and those in Maryland. We believe that detailed consideration of this problem should await completion of the Voorhees study. Meanwhile, we will maintain approximately the same relationship between those fare levels as exists at the present time. We believe that this action is justified, for the time being, by the evidence of record in this proceeding. Transit introduced a cost allocation study which indicated that, while the percentage of costs borne by the Maryland riders was not quite as high as in the District of Columbia, the difference between the two was not so high as to be considered unreasonable. Thus, for the twelve months ended in February 28, 1969, the study indicated that the company had lost $251,381 on its District operations and $92,410 on its Maryland operations. We are not endorsing this study. We will make no conclusions on this cost allocation issue until we have developed a record in the *Payne* remand. However, the company study was subjected to cross-examination and

we do not find it to be patently unacceptable. It provides a reasonable basis on this record for us to maintain a similar relationship between Maryland and D. C. revenues for the remaining period until the *Payne* remand proceedings are complete.

Apart from the general division of revenues and expenses between Maryland and the District of Columbia, questions were also raised as to the appropriateness of Transit's fare zones. This is an area which can be examined in depth in connection with the study undertaken as a result of the *Payne* case. The width of fare zones, and whether they should be bounded at the District line, or some distance inside or outside of it, are proper questions for Commission inquiry, but they can best be studied in the context of the complete review of Transit's zone system which will be possible following completion of the Voorhees study. Accordingly, we believe that we should await the outcome of the Voorhees study and the Payne remand proceedings before we make any attempt to review Transit's present system of fare zones.

There was also testimony on the possibility of having the District of Columbia itself made into more than one fare zone. Mr. Butler testified for the company on some of the difficulties involved. He stated that Washington has corridors of dense population rather than a large core, and that zoning in an attempt to provide less expensive transportation for poor inner-city residents may well be impossible due to the scattered location of the city's poverty pockets.

Protestant Citywide Welfare Rights Organization introduced maps purporting to show concentrations of poor residents, but testimony by staff Urban Transit Planner Kinbar was to the effect that trips in the District of Columbia are of varying patterns, with few inside-core trips, and that the construction of inner-city zones would be likely to exacerbate inequities, while provid-

ing no real saving to the poor as a class. He also detailed the problems resulting from the institution of a more sophisticated collection system that would be necessitated by a new fare structure. He concluded that a sub-zone system for the District of Columbia is economically and socially undesirable.

We find no basis in this record for instituting fare zones within the District of Columbia.

Another basic question on rate structure which is raised on this record is whether to provide a price differential for token fares.

Transit's application proposed a fare of 35 cents cash, or 5 tokens for $1.60, that is 32 cents per token for rides within the District of Columbia. For most of the recent past rate history of Transit, some fare differential favoring the purchase of groups of tokens has been in effect.

The company seeks the return of the practice of giving a discount to token users because it believes that the practice benefits regular riders and is an incentive to travel by bus on a regular basis.

The staff opposed such a price differential because it questioned its feasibility. With the institution of the exact-fare system in 1968, it was no longer possible to purchase tokens on the bus. The company, with cooperation from civic organizations and many commercial establishments, set up token sales outlets at 382 locations by September 12, 1968. With the passage of time, however, the number has declined, apparently due to a disinclination of private stores and business concerns to sell tokens as a public service. As of June 16, 1968, only 205 token sales outlets were operating, with over half of these being in government offices.

A discount would be discriminatory if it were unavailable to large numbers of riders only because of a poor distribution system. Objections can also be raised to the requirement that tokens be bought in lots of 5, since this

has the effect of denying the discount to those who cannot accumulate the $1.60 required for a minimum token purchase. Finally, Transit has failed effectively to meet the argument that allowing use of tokens only on rides originating within the District of Columbia, discriminates against the Maryland riders.

Transit stated that if a cash/token differential were put into effect, it would make every effort to increase the number of its outlets, but the company conceded that it would be more difficult to obtain new outlets in light of the experiences of those who have sold tokens during the past year. Mr. Butler, Transit's Senior Vice President, stated that no plans for expanding distribution have been made.

The staff report concluded that a discount would increase the public's interest in the use of tokens considerably, and logic supports this conclusion, but existing means of distributing tokens appear at the very least to be inadequate to meet the demand that a price differential would engender.

We are not persuaded by Transit's reasoning in justification of a cash/token differential as an incentive to regular ridership, particularly as Transit, in a recent fare case, proposed elimination of the token altogether. In any event, until a method is developed to ensure wide distribution of tokens so as to obviate the discrimination which would be worked upon those who do not have ready access to one of the limited number of token outlets now in existence, we cannot allow them to be sold at a discount. Hence, in our consideration of appropriate fare changes, we will concentrate on examining the impact of fare increases of equal amounts in both the cash and token category.

With these general questions disposed of, we can turn to a consideration of the specific changes in fares required to produce the revenues required by our conclu-

sions herein. As in the past, our guiding principle will be to spread the burden of producing needed additional revenue equitably over all classes of riders.

As a starting point to test the level of increase required, we have computed the results which would occur with a three cent increase in intra-District, intra-Maryland, and all interstate trips, and a five cent increase in the Capitol Hill Express, with other categories unchanged. We find that this would produce a net operating income of $2,313,250, and net income to the equity holders, after interest, of $1,116,324.[13] This is more than twice the return to equity we have found to be proper and we could not approve such a result.

We next computed the results which would occur with a two cent increase in intra-District, intra-Maryland, and all interstate trips, and a five cent increase in the Capitol Hill Express, with other categories unchanged. This would produce a net operating income of $1,541,984 and a return to the equity holder of $345,058.[14] This margin

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[13] A condensed operating statement under these fares is as follows:

Operating Revenues:	
Passenger	$37,647,011
All Other	4,047,168
Total	$41,694,179
Operating Revenue Deductions	39,380,929
Net Operating Income	$ 2,313,250
Rate of Return	5.55%

[14] A condensed operating statement under these fares is as follows:

Operating Revenues:	
Passenger	$36,901,869
All Other	3,971,815
Total	$40,873,684
Operating Revenue Deductions	39,331,700
Net Operating Income	$ 1,541,984
Rate of Return	3.77%

is below the level we believe to be acceptable by any standard.

Hence, we must establish a fare structure which is somewhat above a general two cent increase and somewhat below a general three-cent increase.

We will provide a two cent increase in intra-District fares and, pursuing our recent policy in this regard, will also have the same fare in the first two zones of Maryland intrastate service. There is one category of service in which we think a higher increase can equitably be required. This is the interstate express service. These buses provide a high quality of service to suburban residents. They run non-stop through outlying areas of the District to downtown locations, passing patrons awaiting service on local buses. They serve primarily those en route to and from work. There is an alternative category of bus service available at a lower fare, *i.e.*, the interstate local service. The actual amounts of these fares are higher than many other fares. Hence, a higher increase in terms of cents is not much higher in terms of percentages. In consideration of all these factors, we have determined that a five-cent increase in the interstate express fare is fully justified.[15]

Thus, an increase of two cents in intra-District, intra-Maryland, and interstate local service, with a five cent increase in interstate express and Capitol Hill Express, and no changes in other categories, will produce the following results.

[15] The company had proposed that this category be increased by 10 cents. We have rejected this proposal as too large in relation to the other increases authorized.

Table IV

Projected Operating Statement for the Future
At Fares Prescribed by the Commission

Operating Revenues:		
Passenger		$36,953,311
Schoolfare Subsidy		1,657,766
Charter		2,000,932
Government Contract		123,784
Other		189,333
Total		$40,925,126
Operating Revenue Deductions		
Operating Expenses	$35,873,955	
Taxes (excluding income taxes)	1,254,681	
Income Taxes	28,409	
Depreciation	2,351,080	
Acquisition Adjustment	(173,339)	
Total		39,334,786
Net Operating Income		$ 1,590,340
Operating Ratio		3.89%

The result under this fare structure is a net operating income of $1,590,340 and a return to the equity holders of $393,414. For reasons which we will now discuss, we think that it is an acceptable operating result.

The figures with which we are dealing here are all projections, and, while they represent our best judgment at this time, we are aware that actual results may vary from our estimates. For instance, we have accepted the company's estimate for charter revenues. There is always the chance that the higher estimate of the staff will prevail, in which case, after adjusting for the additional operating costs involved in producing the extra charter

revenues, there would be a net benefit to the company of some $62,000.

There are other areas of some elasticity in our projections. The basic passenger revenue figure of $36,953,311 is constructed from passenger volume forecasts of the company, which are somewhat lower than those forecast by the staff. Although we felt that the company's forecast was superior statistically, if late year trends continue, the more optimistic prognostication by the staff may materialize, in which case additional revenues as high as $148,000 might be generated. Also, the passenger revenue figure we have used above excluded the amount of $10,300 for possible loss of fare box income due to adjustment of the Rockville zones. This is admittedly a very rough figure, and may be entirely too high.

Thus, we see the possibility of net operating income exceeding the $1,590,340 projected in Table IV by as much as $220,000 during the future annual period.

We have found that a fair return in this case would provide a net operating income of about $1,700,000, and after providing for the amount of interest expense forecast by the company, would leave approximately $500,000 for the use of the equity holders. The fare structure utilized in the table now being discussed produces only $393,414. But to the extent that some or all of the unresolved factors come into play, such as additional charter work and an upward trend in passenger volume, there is, in our opinion, a fair likelihood that the $500,000 level will be reached.

If this level is not attained during the 12-month period ending October 31, 1970, the credit in the court-ordered reserve established by Order No. 981 is available to offset the deficit. The company may report to the Commission, as soon as possible after October 31, 1970, the net operating income it will have experienced for the 12 months then ending. To the extent that the net oper-

ating income is less than $1,700,000, they may apply for permission to remove from the riders' reserve and place in the retained earnings account of the company, an amount sufficient to bring the net operating income of the company for that period up to $1,700,000, such credit to retained earnings not to exceed $138,304.[16]

Table V below sets out the effect of the new fare schedules in terms of contribution to total passenger revenues by the three major segments of transit passengers.

Table V

D.C. Transit System, Inc.
D.C./Maryland Revenues
Contribution to Total Revenues

	Future Annual Period At Present Fares	%	Future Annual Period At Authorized Fares	%
Intra-D.C. (1).....	$30,217,732	82.05	$31,729,846	82.18
Intra-Maryland	2,530,180	6.87	2,633,245	6.82
Interstate	4,081,719	11.08	4,247,986	11.00
Total (1)	$36,829,631	100.00%	$38,611,077	100.00%
(1) Includes School Fare Subsidy....	$ 1,507,060	4.09%	$ 1,657,766	4.29%

The relative contributions by each of the segments continues in the same balance as in recent history.

We believe, therefore, that a just and reasonable fare structure would be maintained if we make the following changes in fares:

1. D. C. cash fare raised from 30¢ to 32¢

[16] Set up by WMATC Order No. 981, served October 17, 1969. The credit balance stands at $138,304.

2. Tokens raised from 30¢ (4 for $1.20) to 32¢ (5 for $1.60)
3. Interline fare raised 2¢
4. Maryland intrastate fares raised 2¢ in all zones (32¢, with increments as before, to 92¢)
5. Interstate local service fares raised 2¢ in all zones (47¢, with increments as before, to $1.17)
6. Interstate express service fares raised 5¢ in all zones (50¢, with increments as before, to $1.30)

Two further aspects of this fare structure should be touched upon. First, Transit sought to raise the fare on the D. C. Downtowner (minibus) from 10 cents to 15 cents. Mr. Butler testified that "in view of a 35 cent standard fare, the 15 cent or 20 cent minibus fare is not out of line." (Tr. 123) He stated that he felt that the service cut into regular route patronage, but he would not categorically label it a losing proposition.

Mr. Overhouse did testify that the service operated slightly below the breakeven point, but that, due to the nature of the service, any reductions in service or increases in fares would destroy the attractiveness of it as a shoppers' shuttle, and might render it a complete failure. He further alleged that inefficient scheduling and poor supervision had inflated the costs of the service and depressed its patronage, and that the Commission staff was in the middle of an investigation of how improvements could be effected.

It appears that minibuses are not as sturdy as regular route vehicles, so the cost per mile for their maintenance is higher than the average for the company. This factor is in part balanced, however, by the fact that there is no longer a depreciation expense for the minibuses, which have been fully depreciated.

Having studied the data relating to this service, we are convinced that raising its fare as proposed would lead to its eventual demise. Value-of-service is a valid

concept by which to judge fares and, in our judgment, the shuttle type of service, with very brief rides, which the minibus provides, would not be adequately patronized with a 15 cent fare. The service is close to breaking even. The staff has improvements under study. We think that the wisest course at this time is to maintain the fare at 10 cents.

An important rate structure question was raised by the City of Rockville. It presented exhibits which show that the fare zones within their city limits are substantially smaller than the average zone in Maryland. This means that the cost per mile of going from one side of Rockville to the other is unreasonably greater than a random ride of the same distance. Public transportation should not discourage travel within a political subdivision by imposing inordinately high fares, as appears to be the situation in Rockville. The city contains three full zones and part of a fourth within its corporate limits. This is a specific problem which can, and should, be alleviated prior to our overall rate structure study. Therefore, we directed our staff to propose a salutory and more equitable structure for fare zones within Rockville.

The staff recommended approval of the proposal made by the City of Rockville itself and this result appears just and reasonable to us. Thus, the boundary between zones 6 and 7, now located at New Street, where it crosses Rockville Pike and Viers Mill Road, will be relocated to the intersection of Washington Street and Montgomery Avenue. Further, we will eliminate the line separating zones 7 and 8 which is located at the Rockville Plaza Motel. As a net result, there will be two fare zones within the City of Rockville, as well as a small portion of a third zone at the south city line on Wisconsin Avenue. This change would make the average zone length within the City of Rockville approximately 2.2 miles,

which is comparable to the average zone length of approximately 2.1 miles within D. C. Transit's Maryland zone structure. We find that this recommendation will rectify the inequity of the fare zone structure in Rockville without serious detriment to operating revenues.[17] Passenger revenue figures have been computed on the basis of this change.

Rockville also requested that some alterations be made in the routes and schedules of lines which serve it, in order to have more frequent bus service going through more residential areas. The efficacy of this type of change requires interpretation of local ridership and revenue figures which have not been put before us. As a consequence, we make no finding on this question, but we will expect the company to investigate this matter fully.

[17] Upon review of the Maryland fare zone survey conducted by D. C. Transit on Wednesday, April 16, 1969, the basis for D. C. Transit System Inc.'s Exhibit No. 20, it appears unlikely that the company will lose as much as $10,300 per year because of this restructuring of the zones.

V

OTHER ISSUES

There were certain other questions raised in this proceeding which have not been discussed in the course of the foregoing analysis but which nonetheless merit our careful attention. The first involves the company's bus purchase program.

A. *Bus Purchase Program*

On February 3, 1969, Transit filed Application No. 553, seeking a suspension until further notice of the program requiring it to purchase new buses each year. Inasmuch as this request affected not only the standard of service of the carrier, but also its general financial condition, we made it a part of this proceeding by Order No. 968.

Transit's application for suspension of the program of new bus purchases established in Order No. 773 is based on two arguments: that the company's present equipment is satisfactory, and that the cost of buying new buses seriously weakens its financial structure.

As of June 30, 1969, Transit owned 1,187 buses with an average age of 8.24 years. 76.5% of this fleet was equipped with air-conditioning.

It is difficult to determine whether the size of Transit's fleet is adequate to meet its needs due to the large number of buses presently crippled, a matter which we have discussed in more detail at another point in this order. Transit certainly has not shown that it has a surplus of vehicles, and it is probable therefore, that the average age of its buses will increase if it is not required to carry out a program of replacement. Staff Exhibit No. 1 contains several appendices which clearly show the added maintenance cost involved in operating older

buses. Further, the failure to replace buses means that equipment deterioration will result in less attractive facilities for the public.

Transit's financial arguments are more compelling however. The company contends that even if bus purchases would be beneficial, it simply cannot afford to make any at this time. While not accepting this contention, we are acutely aware that requiring substantial bus purchases adds substantially to the revenues which we must provide the company through the fare box.

Thus, a requirement that 85 new buses be purchased annually would increase the revenue requirement in the future annual period by the following amounts:

(1) Interest Expense	$179,069
(2) Depreciation Expense	203,417
(3) Increased Return on Equity	386,684
TOTAL	$769,170

In light of the issues raised by Mayor Washington and others, as to the adverse impact of fare increases and the possibility of a public takeover, we feel that at this time the reasons for keeping the fare as low as possible outweigh the improved service considerations inherent in the required bus purchase program. Therefore, we will suspend the bus purchase requirements for the time being. It should be clearly noted, however, that our action has only the narrow result of relieving the company of the requirement that it purchase a certain number of buses each year. It does not relieve the company of its duty under the Compact to provide adequate service and facilities to the riding public, and should it develop that some new buses are required in order for the company to meet that duty, we expect the company to acquire those buses. We will watch closely to ensure that the

company's management acts in a responsible manner in determining the extent to which new buses are required.

B. *Service Inadequacies*

In order to provide the public with satisfactory service, sufficient capable manpower must be employed and effectively utilized. Yet the adequacy of the levels of personnel presently employed by Transit was questioned in detail by the Commission staff.

The Engineering Department Report (Staff Exhibit 1) details a decline in the number of employees in several important areas. The most striking decline is in the number of shop and garage employees which has fallen from an average of 558 in 1961 to an average of 408 in the first six months of 1969. This classification includes mechanics and the men responsible for repair and maintenance of Transit's buses. Mr. Butler testified that the company has no quota of maintenance personnel it seeks to employ, and that no overall study of the matter had been made because he believed that Transit's present repair force is adequate.

The maintenance problem was pointed up by exhibits taken from weekly reports which Transit files with the Commission, which showed that between spring 1967 and spring 1969, the average number of crippled buses (buses out-of-service for more than five days) rose from 5% of Transit's fleet to 10%. And the most recent four-week period figure submitted covering the weeks prior to August 8, 1969, show 130 buses, or 11% of Transit's fleet crippled. The average percentage of bus air-conditioners non-operative each day in the summer months has also risen from 6.4% in 1967, to 9.6% in 1969.

Although no recent study has been made of how to decrease the number of crippled buses, a night shift was considered when Transit opened its new maintenance

facility in 1966, but this was deemed to be too expensive in relation to the benefits it would engender.

That this area is of critical importance becomes most clear when it is examined in light of Transit's schedule requirements. The a.m. peak schedule requires 1,069 vehicles. Transit's fleet consists of 1,187 vehicles, which means that if more than 118 buses are inoperative in any one morning, blocks of runs must be cancelled and no cushion of spare buses will be available to replace those which might break down after starting their run. In the 28-week period ending on August 9, 1969, an average of 35 blocks per week were not operated due to unavailability of a vehicle. In addition, 195 blocks per week were not operated due to unavailability of a driver. This average was in fact lessened by the lower bus requirements existing in the summer months. These are inexcusable figures, and they do not reveal partial blocks lost due to unavailability of replacement buses which may have been needed when buses were unable to complete a scheduled run.

A lack of drivers will also cause missed runs, as the figures above show. The company has finally achieved what it believes to be a satisfactory level of employment of bus operators, that is, more than its self-imposed quota of 1,920. As long as blocks are being consistently cancelled due to "no operator," however, Transit's own quota is patently insufficient.

Perhaps no factor discourages ridership as much as non-reliability.[18] Patrons must be able to count on buses arriving as scheduled. Fewer buses in the garage and more on the road will have the joint effect of improving service for the rider and increasing fare box revenues for the company.

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[18] This was repeatedly mentioned at the evening hearings held to receive opinions of the general public.

We expect Transit to operate every schedule. This means that it must improve its maintenance program to the point where all of its operations have buses available, plus spares for last-minute breakdowns. In addition, Transit should have enough drivers to provide all services and, in addition, have a sufficient driver "pool" to cover last-minute driver illnesses and the like. We will not attempt here to prescribe the numbers of buses or drivers needed to accomplish those goals, but will take this occasion to declare that if the vehicle/driver situation is not improved to the point where Transit is operating all of its scheduled services all of the time, we will take direct enforcement action. We also would put Transit on notice that in any future rate case if the level of service is allowed to drop below that required by the Compact, the Commission will consider denying any return to the equity holder so long as that condition exists.

There has also been a decline in the number of employees in the Research and Development Department. Its Traffic Section, which is responsible for checking the use of existing routes, and exploring possibilities for new routes and extensions, has decreased in size from 35 to 19 men between 1961 and 1969. This reduction caused the staff to charge that although day-to-day work is accomplished, "Transit does not have sufficient personnel to make the necessary checks and studies to properly develop, plan and implement service improvements." (Staff Exhibit No. 1, p. 20.)

Another weakening segment of Transit's employment picture is the category of street supervisors. Since 1961, the number of supervisors has shrunk from 44 to 35. This means that Transit's ability to effect on-the-spot alterations in its scheduled service to cope with unforeseen occurrences has similarly declined.

In respect to both of these categories, we also strongly urge Transit's management to effect improvement, as

immediately as possible. Again, we will not attempt to prescribe number of personnel required, but we expect an evaluation by management and a resulting rectification of the employee shortage situation in these two vital areas.

The company will be required to submit regular progress reports concerning its efforts in this area.

The fares we establish today will become effective at 12:01 a.m. on October 26, 1969. The timing is dictated by the expiration of the 150-day period within which action on the application is required and the fact that the token fare is being changed.

FINDINGS OF FACT

We have stated our findings of fact on the issues in this proceeding in our discussion hereinbefore.

CONCLUSION OF LAW

The Commission concludes as a matter of law:

1. That the present fare structure of applicant is unjust and unreasonable in that it will not produce sufficient revenues in the future to enable the carrier to meet operating expenses and earn a reasonable return.
2. That the fares proposed by applicant would be unjust and unreasonable in that they would produce net operating revenues in excess of a fair return.
3. The Commission under the applicable law, including the Compact, is required to prescribe the lawful fare within 150 days from the date on which an application for a fare revision is filed.
4. That the fares authorized by this order are just and reasonable. They are not unduly preferential nor unduly discriminatory either between riders or sections of the Metropolitan District. They are neces-

sary to enable this carrier, under honest, economical, and efficient management, to provide an adequate and efficient transportation service, and they provide the means whereby this carrier may provide an adequate and efficient transportation service in the lowest cost consistent with the furnishing of such service. They will, moreover, afford this carrier the opportunity of earning that return which we have found is necessary to make it an attractive investment to private investors.

THEREFORE, IT IS ORDERED:

1. That the fares proposed by D. C. Transit System, Inc., in tariff revisions filed May 29, 1969, be, and they are hereby, denied.

2. That D. C. Transit System, Inc., be, and it is hereby authorized to file appropriate revisons to Tariff No. 41 on or before October 24, 1969, to become effective at, or after, 12:01 A.M., October 26, 1969, setting forth fares shown in Appendix attached hereto, and made a part hereof, and as shown below:

(A) D. C. cash fare: thirty-two cents (32¢).

(B) Token fare: thirty-two cents (32¢), five (5) for $1.60. Tokens may be used as equivalent to thrity-two cents (32¢) cash.

(C) Interline ticket or transfer, good for five cents (5¢) reduction in fare to connecting carrier. Interline ticket or transfer will be accepted from connecting carrier, good for a five cents (5¢) reduction in fare. (This involves a two cents (2¢) increase per ride.)

(D) Capitol Hill Express Service: seventy cents (70¢) cash, or a valid D. C. Transit transfer or token plus thirty-eight cents (38¢) cash.

(E) Maryland Intrastate service: thirty-two cents

(32¢) cash or token for the first two zones of carriage or any part thereof; fifteen cents (15¢) additional cash for the third zone of carriage, or any part thereof; and five cents (5¢) additional cash for each succeeding zone of carriage, or any part thereof.

(F) Maryland-District of Columbia Interstate Local service: forty-seven cents (47¢) cash or fifteen cents (15¢) cash plus one token for regular route service between the District of Columbia and the first zone of carriage, or any part thereof, in Maryland; ten cents (10¢) additional cash for each of the next three zones of carriage, or any part thereof, in Maryland; five cents (5¢) additional cash for each succeeding zone of carriage, or any part thereof.

(G) Maryland-District of Columbia Interstate Express service: fifty cents (50¢) cash or eighteen cents (18¢) cash plus either a valid D. C. Transit transfer or one token, between the District of Columbia and the Maryland-District of Columbia line; ten cents (10¢) additional cash for each of the first, second, third, or fourth zones of carriage, or any part thereof, in Maryland; and five cents (5¢) additional cash for each succeeding zone of carriage, or any part thereof, in Maryland.

3. That tokens outstanding on October 26, 1969, shall be honored as though purchased at the new rate prescribed herein.

4. That interstate express and interstate local commutation tickets outstanding on October 26, 1969, shall be honored as though purchased at the new rate prescribed herein.

5. That D. C. Transit revise the fare zone boundaries, in Tariff No. 41, relating to Rockville, Maryland, as shown below:

(A) Fare zones six (6) and seven (7) on routes O3, O4, O5 and O6 be combined into a new fare zone six (6) between Montgomery Avenue and Halpine Road and Montgomery Avenue and Laird Street, Rockville (end of line).

(B) Fare zones six (6) and seven (7) on routes Q1, Q7 and Y8 be combined into a new fare zone six (6) between Viers Mill Road and Atlantic Avenue and North Washington Street and Montgomery Avenue, Rockville; and that the next fare zone, seven (7), begin at North Washington Street and Montgomery Avenue for these routes and that all subsequent zones be renumbered accordingly.

(C) Fare zones six (6), seven (7) and eight (8) on routes Q3 and T2 be combined into a new fare zone six (6) between River Road and Falls Road and North Washington Street and Montgomery Avenue, Rockville, and that the next fare zone for these routes, seven (7), begin at North Washington Street and Montgomery Avenue and that all subsequent zones be renumbered accordingly.

6. That the program for purchasing an annual average of new air-conditioned buses in a number equal to one-fourteenth (1/14th) of the number of buses in applicant's fleet, established by the Commission in Order No. 773, be, and it is hereby, suspended.

7. That the applicant's account for Track Removal and Repaving Expense be charged the amount of $115,825.94 equally over the 12-month period beginning November 1, 1969, with a contra-credit to the Reserve for Track Removal and Repaving.

8. That the applicant report monthly, in a form to be prescribed by the Staff, on its efforts to provide all scheduled service, and to have an adequate bus maintenance program, an adequate research and development group, and a sufficient number of street supervisors.

BY DIRECTION OF THE COMMISSION:

GEORGE A. AVERY
Chairman

HOOKER, Commissioner, not participating.

A432

WMATC Order 984

Appendix

PRESENT, PROPOSED AND AUTHORIZED FARES

Application No. 573

	Present Fares	Proposed Fares	Authorized Fares
District of Columbia			
Cash	$ .30	$ .35	$ .32
Token	.32 (4/1.20)	.32 (5/1.60)	.32 (5/1.60)
Interline – To D.C. Transit	.25	.30	.27
– From D.C. Transit	.30	.35	.32
Capitol Hill Express	.65 (a)	.70 (d)	.70 (e)
Minibus Downtown Shopper	.10	.15	.10
School	.10	.10	.10
Transfer	Free	Free	Free
Maryland Intrastate			
Zone 1	$ .30	$ .35	$ .32
2	.30	.35	.32
3	.45	.50	.47
4	.50	.55	.52
5	.55	.60	.57
6	.60	.65	.62
7	.65	.70	.67
8	.70	.75	.72
9	.75	.80	.77
10	.80	.85	.82
11	.85	.90	.87
12	.90	.95	.92
D.C.–Md. Interstate Local			
Zone 1	$ .45 (b)	$ .50	$ .47
2	.55 (b)	.60	.57
3	.65 (b)	.70	.67
4	.75 (b)	.80	.77
5	.80 (b)	.85	.82
6	.85 (b)	.90	.87
7	.90 (b)	.95	.92
8	.95 (b)	1.00	.97
9	1.00 (b)	1.05	1.02
10	1.05 (b)	1.10	1.07
11	1.10 (b)	1.15	1.12
12	1.15 (b)	1.20	1.17

WMATC Order 984

	Present Fares	Proposed Fares	Authorized Fares
D.C.–Md. Interstate Express			
D.C.–Md. Line	$ .45 (b)	$ .55 (e)	$ .50 (e)
Zone 1	.55 (b)	.65 (e)	.60 (e)
2	.65 (b)	.75 (e)	.70 (e)
3	.75 (b)	.85 (e)	.80 (e)
4	.85 (b)	.95 (e)	.90 (e)
5	.90 (b)	1.00 (e)	.95 (e)
6	.95 (b)	1.05 (e)	1.00 (e)
7	1.00 (b)	1.10 (e)	1.05 (e)
8	1.05 (b)	1.15 (e)	1.10 (e)
9	1.10 (b)	1.20 (e)	1.15 (e)
10	1.15 (b)	1.25 (e)	1.20 (e)
11	1.20 (b)	1.30 (e)	1.25 (e)
12	1.25 (b)	1.35 (e)	1.30 (e)
Silver Rocket			
2 Zones	$ .35	$ .35	$ .35
Addl Zones	.10 ea addl zone Transfer Privilege	.10 ea addl zone Transfer Privilege	.10 ea addl zone Transfer Privilege
D.C. Stadium	$ .75	$ .75	$ .75
Virginia Interstate Zone			
Rt. C-1 Langley	$ .10 (c)	$ .10 (c)	$ .10 (c)

(a) or valid transfer plus 35¢ cash

(b) valid transfer or token has 30¢ value toward total cash fare

(c) available only in addition to D.C.-Md. Interstate or Md. Intrastate fare

(d) or valid transfer or token plus 38¢ cash

(e) transfer or token has 32¢ value

Note: Combination of tokens may be used for payment of fare.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION WASHINGTON, D.C.

ORDER NO. 1052

IN THE MATTER OF:	Served June 26, 1970
Application of D. C. Transit System, Inc., for Authority to Increase Fares.	) Application No. 613)) Docket No. 216

APPEARANCES:

HARVEY M. SPEAR and MANUEL J. DAVIS, appearing on behalf of D. C. Transit System, Inc., applicant.

MALAKU J. STEEN, appearing on behalf of himself as a protestant.

MRS. PATRICIA WALD, appearing on behalf of the Willing Workers, a group of welfare recipients housed in the Arthur Kapper Housing Project, protestants.

JOEL YOHALEM, appearing on behalf of himself as a protestant.

EARLE PUTNAM, JONATHAN P. SINER, and HERMAN STERSTEIN, appearing on behalf of the Amalgamated Transit Union, and the Amalgamated Transit Union Local 689, protestants.

ALFRED S. TRASK, appearing on behalf of the D. C. Federation of Civic Associations, protestants.

CHRISTOPHER A. KANE, appearing on behalf of himself as a protestant.

C. BELDEN WHITE II, appearing on behalf of the District of Columbia, protestant.

DOUGLAS N. SCHNEIDER, JR., General Counsel, Washington Metropolitan Area Transit Commission.

BEFORE GEORGE A. AVERY, Chairman, WILLIAM O. DOUB, Vice Chairman, H. LESTER HOOKER, Commissioner

I

THE PROCEDURAL BACKGROUND

On March 13, 1970, D. C. Transit System, Inc. (Transit) filed revisions to its Washington Metropolitan Area Transit Commission Tariffs No. 41 and No. 45, accompanied by supporting information as required by Commission Regulation 56-01(c), which was designated Application No. 613.

Transit's application proposed the following changes in Transit's rate structure:

1. Intra-District of Columbia:
   Cash fare of 40¢ for regular route service within the District of Columbia (presently 32¢).

   Five tokens for $2.00 for regular route service within the District of Columbia (presently 5 for $1.60).

2. Capitol Hill Express:
   Cash fare of 75¢ for Capitol Hill Express Service or 35¢ cash fare and a valid D. C. Transit transfer or one token (presently 70¢).

3. D. C. Downtowner (Minibus) cash fare of 20¢ (presently 10¢).

4. Maryland local intrastate service:
   40¢ cash fare for the first two zones of carriage, or any part thereof (presently 32¢). 15¢ additional for each succeeding zone or any part thereof (presently 15¢ for third zone and 5¢ additional for each succeeding zone or any part thereof).

5. Maryland–District of Columbia local interstate service:
   60¢ cash fare for regular route service within the District of Columbia and the first zone of carriage, or any part thereof, in Maryland (presently 47¢). 10¢ additional for the second zone, 15¢ additional for each succeeding zone or any part thereof,

(presently 10¢ for each of the third and fourth zones and 5¢ additional for each succeeding zone or any part thereof).

6. Maryland–District of Columbia express interstate service:
60¢ cash fare (or 20¢ cash fare and a valid D. C. Transit transfer or one token) between the District of Columbia and the Maryland–District of Columbia Line (presently 50¢). 10¢ additional for each of the first and second zones and 15¢ additional for each succeeding zone or any part thereof. (Presently 10¢ additional for each of the first, second, third and fourth zones and 5¢ additional for each succeeding zone or part thereof.)
7. RFK Stadium service:
Cash fare of $1.00 or 20 ride ticket for $15.00 (presently cash fare of 75¢).
8. Virginia interstate zone:
15¢ (presently 10¢).

At the same time Transit submitted a motion requesting that it be granted an interim increase in fares pending a decision on its application. Transit based its petition for an interim fare increase on an alleged shortage of operating funds exacerbated by the failure of fare box revenues to cover day-to-day expenses.

In Order No. 1031, issued March 26, 1970, we determined that the issues raised by Transit's motion should not be decided without giving the public an opportunity to be heard. As a public hearing involves giving due notice to the public, allowing an adequate period for preparation and presentation of rebuttal evidence, and time for us to deliberate on the questions presented, we determined that an expeditious consideration of Application No. 613 would be a wiser course for us to follow. The motion for interim relief was held *sub judice,* how-

ever, so that appropriate action in any developing emergency situation would be possible.

On April 10, 1970, Order No. 1035 suspended Transit's proposed tariff through July 10, 1970.

In light of our decision to expedite the application, Order No. 1031 set hearings on the matter to begin April 20, 1970. Eight formal protestants were admitted to the proceedings: Malaku J. Steen, pro se; the Government of the District of Columbia; the D. C. Federation of Civic Associations, Inc.; the "Willing Workers"; Joel Yohalem, pro se; the Amalgamated Transit Union, AFL-CIO; the Amalgamated Transit Union, Local Division 689; and Christopher A. Kane, pro se.

Notice of the hearing was given in accordance with Commission rules and regulations. Five sessions of formal hearings were held during which Transit presented testimony from six of its officers. In addition, the Deputy Mayor of the District of Columbia; the International President of Amalgamated Transit Union; the President of Division 689, Amalgamated Transit Union; and the Chief Engineer and Chief Auditor of the Commission staff presented evidence. An evening hearing to elicit comment from members of the public was also held. Three members of the public appeared and spoke.

II

PROJECTED FINANCIAL RESULTS

A. *The Historical Period*

Both the company and the Commission staff used the 12-month period ended November 30, 1969, as the historical year upon which to base forecasts for the future annual period. The staff concurred in Transit's statement of its operating revenues for that period. After thorough audit, however, the staff made adjustments to

the company's statement of operating revenue deductions which had the net effect of reducing operating costs by $24,295.67.[1] As the adjustments by the staff were not challenged or rebutted, the figures presented by the staff in its Exhibit No. 3 will be accepted as the base for forecasting the operating results of the future annual period. Accordingly, we find that the operating results for the 12 months ended November 30, 1969 were:

TABLE I

	12 Months Ended November 30, 1969 Adjusted
Operating Revenues:	
Passenger	$35,266,744
Schoolfare Subsidy	1,518,729
Charter	2,192,448
Government Contracts	120,583
Station and Vehicle	161,269
Other	136,730
Total Operating Revenues	$39,396,503
Operating Revenue Deductions:	
Operating Expenses	$35,060,255
Taxes, Other Than Income Taxes	1,283,711
Income Taxes	6,491
Depreciation	2,404,916
Amortization of Acquisition Adjustment	(230,527)
Track Removal	9,652
Total Operating Revenue Deductions	$38,534,498
Net Operating Income (Loss)	$ 862,005
Operating Ratio	97.81%
Rate of Return on Operating Revenues	2.19%

The company incurred interest expense of $1,293,651 in the historical period. Hence, the net loss for the pe-

[1] The major adjustments made by the staff were disallowance of a $6,220.38 unsupported office expense and a $10,000.00 legal fee for non-Transit services.

riod amounted to $431,646. As of November 30, 1969, Transit had retained earnings of $1,241,203.58.

B. *Projections of Revenues and Expenses–At Present Fares*

We turn next to projections of the operating results which Transit can expect in the future annual period at present fares. Although there is dispute between company and staff on various items of revenue and expense, both agree that the company will not obtain sufficient revenues under present fares, even to cover operating expenses. However, the company projected a loss about $440,000 higher than the staff. We will discuss the disputed items of revenues and expenses.

1. *Revenues*

Our first task is to determine projected revenues for the future annual period. There was dispute between the company and staff on several categories of revenue.

The first and most important category is passenger revenue. Projection of this figure depends in turn upon estimates of future ridership. Staff and company each took a different approach in making their estimates in this proceeding. The company ascertained actual ridership in the 13-week period immediately following the last fare increase, i.e., the 13 weeks ending January 24, 1970. The annualization was made by determining what percentage of a year's revenue was made up by the equivalent 13-week period during the twelve months ended October 25, 1969. This percentage factor was then applied to the actual ridership experience for the 13 weeks following the latest fare increase, as mentioned above, to develop the annual ridership for the future period.

The staff's methodology made use of actual ridership figures under present fares for a longer period than the

company. The staff used such figures for five months, rather than the thirteen weeks used by the company.

However, the staff used a different approach to annualizing. Rather than projecting the five month levels into the future, the staff looked at actual ridership for the seven months preceding the last fare increase, i.e., that of October 25, 1969. A resistance factor of .32% was applied to those figures to determine the impact of the October 1969 fare increase. This adjusted figure for seven months was then added to the actual ridership for the five months following the increase to obtain an annual ridership.

It should be noted that neither staff nor company gave effect to any declining trend in ridership other than that attributable to fare resistance.

In our opinion, neither approach is fully satisfactory. The company used a data base of thirteen weeks. As we indicated in Order No. 984, this is an undesirably small period on which to base an annual projection. It can produce a distorted result. On the other hand, we have questions about the staff approach, particularly because it takes into account no declining trend other than that attributable to resistance. When we look at the weekly passenger reports, however, we see a continuing downward trend in ridership which exceeds that attributable to resistance factor relied on by the staff.[2]

To test the figure, we have performed an independent check, utilizing data in the record. Specifically, we have applied the annualization method we utilized in the last Transit rate case—essentially that used by the company here—to the five months of post-fare increase data uti-

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[2] The regular ridership reports for all of 1969 and for 1970 through February 28, are in evidence as Transit's Exhibit A. To ensure that the picture thus reported has not changed, we have taken official notice of the report which covers the period through May 31, 1970. It shows that the decline in question is continuing.

lized by the staff. This calculation indicates an annual ridership of 113,253,766, 513,724 less than the figure produced by the company and 933,427 less than the figure produced by the staff. We have also applied that same method to the very latest data available to us from regular reports filed by the company. This data, covering the period through May 31, 1970, gives seven months of actual ridership under present fares. Annualizing this figure by the method used in the last case indicates an annual ridership of 112,785,616, 981,874 less than the company figure and 1,401,577 less than the staff.

Based on all those factors, we are certain that we should not adopt the staff projection. Even the company figure might be too high. However, the burden of proving its entitlement to relief is on the company. We will not ask the rate payer to provide additional revenues which the company, in effect, did not seek. To the extent that revenues are not forthcoming because ridership is less than the company's own projection, the company must absorb that shortfall.[3] For purposes of projecting the future period's passenger revenues, therefore, we will rely on the company's projection of ridership.

The company projected school subsidy revenues of $1,868,633 while the staff projected only $1,772,709. The company's school ridership figure was developed by them on the basis of the same 13-week period used in determining regular route ridership. Similarly, the staff used the same period for its school ridership projection as it did for its regular route passenger projection. School ridership per monthly reports on file with the

[3] This is not like the situation which we faced when we issued Order No. 900 in December, 1968. There, the ridership estimate was so far off that the company was actually operating at a loss. Here, even if the lower figures indicated by our analysis materialized, the company will still cover its expenses and interest. It will have to forego some profit only.

Commission, is on the up-trend and the staff's approach fails to give recognition to that fact. We think that the company's methodology, reflecting more current data, is preferable and we will adopt that figure.

Another area in which company and staff were at variance was the amount of charter revenues which were predicted for the future annual period. Transit predicted a slight decline from the historical period based on the judgment of George Keyser, its Vice President in Charter of Operations, who stated that he made an educated guess of revenue for each month in the future annual period based on advance bookings, and totaled up the figures to reach his prediction.

The staff on the other hand, predicts an increase in charter revenue in the future. The staff figure was arrived at by annualizing the charter revenues in Transit's three most recent quarters.[4]

The question of charter revenue projection is always a difficult one, since it is so much a matter of judgment. In the last case, we were willing to accept Mr. Keyser's estimate. However, subsequent experience has proven that estimate was quite low.[5] Mr. Keyser himself stated that his estimate here was conservative. In the present case, we believe that the staff's method of projecting a continuation of present trends is more likely to be accurate than that presented by the company. Staff Exhibit 1, Appendix I shows that Transit has experienced steady yearly increases in charter revenue with the lone exception of 1968, the year of the civil disturbance. There-

[4] A full year's actual figures were not used because an increase in charter rates was granted in September, 1969, making comparisons difficult.

[5] The charter estimate of D. C. Transit in Docket 201 for 12 months ended 6/30/70 was $1,948,021. Historical experience, 12 months ended 5/31/70 was $2,277,555, for 12 months ended 3/31/70, $2,285,464.

fore, we will project Transit's charter revenue at the level suggested by the staff.

We will also accept the staff's figures for government contract, station and vehicle, and other revenues, in which a staff correction based on an error in computing expected Council of Governments routes revenues was the only controverted item.

2. *Expenses*

Our next task is to determine what expenses Transit would have if it operated in the future annual period at its present fares. Transit submitted projected operating revenue deductions totalling $43,988,134. The staff auditors suggested adjustments to those figures, all but one of which, a $375,000 difference as to the injuries and damages reserve, were acquiesced in by the company.

In addition, several policy issues were raised at the hearing, which would affect Transit's operating expenses in the future annual period. These included a proposed increase in Transit's maintenance force, the possible reinstitution of the bus purchase program and the treatment of certain management salary increases.

Finally, there is the matter of the proper allowance for the cost of streetcar track removal.

Each of these subjects requires discussion.

a) *Injuries and Damages Reserve*

One of the bases upon which Transit rests its claim for increased fares is its contention that the amount of $1,300,000 allowed annually as a credit to the injuries and damages reserve is no longer adequate and, therefore, the amount should be substantially increased.

We established the amount of $1.3 million to be credited to the reserve in Order No. 564, issued on January 26, 1966, and the figure has not been adjusted since that

time. Transit asserts that the number of claims filed has increased each year and the cost of satisfying claims obligations has increased. The number of claims and suits pending on January 1, 1966, was 1,078 and at the close of the historical year, November 30, 1969, that number had increased by over 100%. Auto repair costs and the costs of hospitalization and medical treatment have likewise risen.

The company asked that the injuries and damages reserve allowance be increased to $2,250,000 annually. The staff witness, on the other hand, recommended that the reserve credit be increased to $1,850,000 annually.

The company witness estimated that expenditures in the future annual period would amount to $1,735,485 as opposed to the staff witness' estimate of $1,639,745. Both agreed that some deficiency in the reserve balance of $1,832,294 as of March 31, 1970, would develop by the end of the future annual period based on the current rate of expenditure plus the anticipated expenditure during the future period. The company estimated that deficiency would be $129,701; and the staff, $33,961. Thus, to restore the balance to the level of March 31, 1970, the staff estimates $566,000 will be needed in the future annual period in addition to the $1.3 million already allowed; and the company estimates an additional requirements of $662,000. The difference between the staff's estimate and the company's for expenditures during the future annual period is due to the staff's use of $1,900 as the average cost of judgments and compromise settlements, a figure rounded down from the average of $1,961, the average for the year 1969. The company, on the other hand, used an average cost of $2,185.79. We have some doubt about the fairness of using a figure rounded down and believe that rounding the figure to the nearest thousand, to $2,000, would be more reasonable. The staff figure, adjusted by using the

$2,000 average for judgment and compromise settlements, would be approximately $1,900,000 annually.

This amount is in line with historical experience. In 1966, when we set the annual credit to the reserve at $1.3 million, the reserve balance stood at $1,872,037. The expenditures from the reserve fund for the next four years were as follows: for 1966, $1,068,619; for 1967, $1,127,373; for 1968, $1,286,655; and for 1969, $1,587,211. While there was a relatively gradual increase in demand on the reserve between 1966 and 1967, and between 1967 and 1968, the increase between 1968 and 1969 was very sharp. We believe this experience indicates that a reserve allowance of $1,900,000 will be reasonable for the future.

One other aspect of the injuries and damages reserve issue involves the possibility of a reserve deficiency. The company requested an allowance to permit the amortization of a deficiency in the reserve that it says will result from satisfaction of claims outstanding prior to March 31, 1970. The company contends that deficiency will be $916,257.

This figure is based on an estimate of the cost of settling suits actually filed and expected to be filed, cost of settling claims not litigated and the estimated cost of liability for workmen's compensation. The staff witness concluded that the deficiency from settlement of past pending claims would not reach the level anticipated by the company, but his analysis admittedly did not take into account the possibility that some of the pending claims would develop into law suits which are costlier to the company, on the average, than satisfaction of claims not involving litigation. Therefore, we believe the company methodology to be sounder.

However, even though the method used by the company is the more complete, it is apparent that the estimates made are so speculative as to be unreliable as a

basis for a finding as to what deficiency will actually develop. We will not attempt at this time to determine what deficiency in the reserve can be expected from pending claims. Rather, we will hire the services of a consultant to do a study to determine the extent of the deficiency and we will make whatever adjustments to the reserve allowance seem appropriate at the next opportunity.

Finally, with respect to the injuries and damages issue, the staff recommended that any increased amount in the injuries and damages reserve be funded to provide an assurance that the funds credited to injuries and damages will, in fact, be available for the purpose intended. The company witness agreed to the funding of the increased amount, but only with respect to amounts expected to be paid to claimants and not administrative costs. We agree that actual funding of the reserve is desirable and will require 70% of the entire $1,900,000 annual credit, the approximate portion of the fund paid to claimants, to be funded at the rate of $110,833 per month.

b) *Maintenance Force*

The company proposed an upward adjustment of $474,073 in its maintenance expense in the future annual period. The expense would be incurred to institute a night force of 20 mechanics and a foreman. There is no question that the company's maintenance program has been deficient and that, as a result, the number of buses available for service has been inadequate. The record shows that in the six months ending in April of this year, an average of 63 "blocks" per week have not been operated due to a lack of vehicles. At the same time, according to the record, there have been more than 100 buses per day held in the garages for repairs. On the average, it took 16 days between the time a bus went out of service and the start of repairs.

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There is nothing which causes greater concern from the service standpoint than the cutting of runs for whatever reason. The lack of dependability and the overcrowding thus caused can only accentuate the problems which the company has in retaining ridership. We regard this as a situation which requires correction.

The staff called into question, however, the need for the institution of a night shift as proposed by the company. The staff took note of the fact that in February of this year, the company instituted a Saturday overtime shift in an effort to deal with the backlog of crippled buses. As a result, the average number of buses awaiting repair dropped from 88 in February to 52 in April. The staff felt that these facts indicated that the Saturday shift would be sufficient to cure the problem.

The company took substantial issue with the staff's view of the problem, however. For one thing, the Saturday shift is performed on the basis of voluntary overtime. There is serious question whether it is feasible to continue such a program for an indefinite period. In addition, the period in which the Saturday shift has been in effect is a period of improving weather conditions. This is turn leads to a lessening of the bus breakdown problem. It is questionable whether this solution would cope with problems which will arise when the weather worsens. Finally, the company's maintenance vice president asserted that the night shift would enable him not only to clear up the existing backlog of crippled buses, but also to institute an improved program of preventive maintenance which would alleviate to some degree the problems of breakdown while in service.

We have concluded that the staff's hope that the Saturday shift alone will solve the problem is unduly optimistic. There would seem to be serious limitations on the effectiveness of such a program over an extended period. Moreover, we would like to see the kind of im-

provement in the maintenance program which the night shift would make possible.

The amount we will allow for this activity is $517,200, which is the total cost of the expanded maintenance program after adding payroll fringe costs.

We wish to be certain, however, that the public gets what it is paying for. Accordingly, we will require the company to place the sum we are allowing for this purpose in a special escrow account. The escrowed funds may be used by the company to defray the cost of the added maintenance force once it demonstrates that it has actually instituted a night shift with a work force at the level for which we have made allowance. We will also require the company to demonstrate that there has been no simultaneous reduction in personnel, particularly in maintenance workers but generally in all areas of the company's employment. If the company fails to institute the program promptly or fails to maintain it at the projected level, so that excess sums accumulate in the fund at any time, the Commission can direct that the excess be used as a riders' fund for such purpose as appears appropriate. The staff will be directed to develop the necessary information as to existing work force levels and to require the submission of such reports as are necessary to ensure that the effort which we have authorized is in fact incremental to existing maintenance programs.

c) *Bus Purchase*

In Order No. 984, we suspended the company's bus purchase program and reduced depreciation expense and return levels accordingly. The company has purchased no buses since that time and has no present plans to do so.

We were not happy about our decision in this regard in Order No. 984 but we felt that it was in the best interest of the riding public at that time in light of then

pending possibilities for solution of the problem of increasing fares. As discussed elsewhere in this opinion, we are now forced to the conclusion that there is no prospect for prompt action in the Congress to alleviate the economic problems afflicting this company. In our judgment, action of this kind seems unlikely in this session of Congress and we could not be optimistic about the next session.

Meanwhile, the average age of buses in the fleet is increasing. Buses more than 21 years old continue to be used in service. The program for providing an all-modern fleet of air-conditioned buses is stalled. We think that this is the time to face up to this problem realistically, and require the company to reinstitute a bus purchase program. Otherwise, the community faces the steady and ever-worsening deterioration of the fleet serving it. We are not willing to permit this to happen.

We will, therefore, require the company to purchase 85 buses annually and we will adjust depreciation expense accordingly.

We recognize the problems which the company may have in placing an order immediately in view of the financial problems it has currently been facing. These problems will undoubtedly make it difficult to obtain the necessary financing at the first possible moment. The staff will monitor the company's efforts closely and will make independent checks of credit availability.

In order to exercise some control over the acquisition of the new buses, and see to it that the financial means to carry out the transaction are there, we will order the funding of the down payment requirement. This will sequester $620,000 of profit for down payment purposes to buy the buses.

d) *Management Salaries*

We have noted that the company's projected expenses include $15,000 for increases in salaries to top management officials of the company.[6] We have determined that this is an expense we must disallow for rate-making purposes.

We wish to make it expressly clear that the action is in no way intended to cast aspersions upon the manner in which these officials are performing their duties. It may well be that those performances merit an increase in pay.

However, to give such increases at a time when the company is undergoing the financial problems being faced by D. C. Transit is not an action which we can condone nor which we can ask the riding public to pay for. If the management chooses to increase salaries in circumstances like these, that is a matter between it and its stockholders. We must disavow the action by placing the expense below the line.

e) *Track Removal*

Another item of expense that must be determined is the allowance for track removal. The company initally included $483,165.40 for track removal over and above its existing reserves. It based this figure on a February 1970 letter from the D. C. Department of Highways and Traffic which indicated that removal work costing $642,543.90 would be required in the period in question. Because track removal estimates are subject to change, the staff undertook to secure a more recent estimate than had been presented by the company. On May 2, 1970, the staff reported that the Highway Department estimate had indeed been revised. The anticipated cost had in-

[6] Senior Vice President $5,000; Vice President and Comptroller $5,000; Vice President-Sales $5,000. Transit's President received a $10,000 increase, but no adjustment is made because the expenses projected by Transit, as well as by the staff, excluded this amount; if it were included, we would have disallowed it.

creased by $43,011.63. We will use the later figure since it is the more recent and accurate one. Thus, we will allow track removal expense in the future annual period of $526,177.03.

We should like to say again that this is an item of expense which, in our judgment, should not be borne by the ratepayers. The burden is growing substantially large as increased track removal is occasioned by subway construction. The amount we must allow for this expense in this case is more than 190% higher than in the rate case of last year. Indications are that the expense will grow even more steeply in the future. We call upon those who would assist us in providing some relief to the ratepayer from rising fares, particularly the city government, which was a protestant in this case, to join us in our efforts to have the track removal burden lifted from the ratepayer and assumed by the community at large.

It is perfectly apparent, therefore, that under present fares, the company will suffer catastrophic losses in the future annual period. Even with no purchase of new buses, its revenues will fall short of meeting operating revenue deductions by $2,676,115. It will, in addition, incur interest expense of $1,298,875 making a total loss of $3,974,990.[7]

These facts make adjustments in the fares not only necessary but imperative and we will turn to a discussion of the further questions concerning projected results which are raised by the fare adjustments we will authorize. We are not unmindful that, notwithstanding the bleak and unacceptable results which would follow from a failure to increase fares, that very course has

[7] It should be noted that even if all questions concerning revenues and expenses were resolved in the manner most favorable to the ratepayer, it would still have to be concluded that an operating loss in the millions would be incurred.

been urged upon us in these proceedings. The questions thus raised will be discussed in an ensuing section of the order, at page 25, *infra*.

This completes our discussion of the disputed items of revenues and expenses in the future annual period.[8] On the basis of that discussion, we can make the projection set out in Table II. We have indicated therein the projection with and without the bus purchase requirement in order that the impact of that amount can be clearly seen and understood.

TABLE II

Projected Operating Statement for Future Annual Period With No Change in Fares

Operating Revenue	No Purchase of Buses	Purchase of 85 Buses
Passenger	$36,684,224.00	$36,684,224.00
School Subsidy	1,772,709.00	1,772,709.00
Charter and Sightseeing	2,402,968.00	2,402,968.00
Government Contract	137,336.00	137,336.00
Station & Vehicle Privileges	137,869.00	137,869.00
Other	136,095.00	136,095.00
Total Operating Revenue	$41,271,201.00	$41,271,201.00
Operating Revenue Deductions		
Operating Expenses	$39,822,244.97	$39,822,244.97
Taxes, other than Income Taxes	1,425,761.80	1,425,761.80
Depreciation	2,226,217.00	2,439,225.30
Amort. of Acquisition Adjust.	(72,305.53)	(72,305.53)
Provision for Track Removal & Repaving	526,177.03	526,177.03
Income Taxes	19,221.19	19,221.19
Total O/R Deductions	$43,947,316.46	$44,160,324.76
Net Operating Income	(2,676,115.46)	(2,889,123.76)
Operating Ratio	106.48%	107.00%
Rate of Return on Operating Revenue	(6.48)%	(7.00)%

[8] There is one additional item of expense, for an improved marketing program, which is not reflected in Table II because it would not be feasible under present fares, but which is taken into account in projections under authorized fares. See page 24, *infra*.

C. *The Return To Be Allowed*

Since July of 1968, we have heard three complete D. C. Transit rate proceedings, including the present one. In those proceedings we have heard testimony on rate of return from Mr. John F. Curtin, for the company, and from Mr. David Kosh and Mr. R. L. Banks, for the staff. In each of these proceedings, we have given very close scrutiny to the rate of return question. Our most recent review was conducted just eight months ago in connection with Order No. 984. In light of the history, it was generally agreed by the parties to this proceeding that a new review by yet another set of independent experts of the rate of return question would not be necessary in this proceeding. Instead, it was stipulated that we would take official notice of all rate of return testimony in the last two rate proceedings. Thus, that evidence forms the underlying basis of our decision in the instant case. The testimony in question has been described and summarized in our Orders Nos. 880, pp. 23-36 and 984, pp. 13-18. We will not repeat that discussion but herewith incorporate it by reference.

Because of the frequency of D. C. Transit rate cases in recent years, our views on their return are well-developed and repeatedly spelled out. Our guidepost is the decision of the court of appeals in *D. C. Transit System, Inc.* v. *WMATC*, 350 F.2d 753 (D.C. Cir. 1965). The court there stated that

> "A 'just and reasonable' rate is one that assures that all the enterprise's legitimate expenses will be met, and that enables it to cover interest on its debt, pay dividends sufficient to continue to attract investors, and retain a sufficient surplus to permit it to finance down payments on new equipment and generally to provide both the form and substance of financial strength and stability." 350 F.2d at 778.

We can focus our attention more narrowly on certain elements of this standard. The rates here granted will cover the company's legitimate expenses and the interest on its debt. Hence, we can look most closely at the amount remaining thereafter to determine whether it will permit the company to pay an adequate dividend, while leaving retained earnings which both provide sufficient internally generated capital to finance new equipment purchases and protect the company's financial integrity.

The fares here authorized will, after payment of legitimate expenses, leave a net operating income of $2,440,284. The company's outstanding debt will give rise to interest payments of $1,198,875. In addition, we are here requiring the reinstitution of the bus purchase program. The required purchase in the future annual period will cost a total of approximately $3,106,373. We estimate that $2,485,099 of this amount will be debt financing and that this debt will carry a charge of at least 10%. Thus, there will be additional interest expense, after allowing for the reducing balance of the notes given in payment for the new buses, in the amount of $234,263. In addition, it was brought out at the hearing that Transit had borrowed an additional $1,000,000 in April, 1970, at an interest rate of 10% in order to pay its contribution to the employee pension fund. There will be additional interest expense attributable to this loan, of $100,000.[9] There will thus be total interest expense in the future annual period of $1,533,138. The authorized fare structure will then produce a return to the equity holders of $907,146.

This amount would, on a theoretical basis, permit the payment of a "dividend sufficient to continue to attract investors." However, we think it is highly unlikely that any dividend would be paid at all. This company has

[9] The April loan expires December 31, 1970. However, we assume that at maturity it will have to be refinanced.

operated at a loss for the past three years. Its current liabilities have risen to the level of $10,416,083, four times its current assets. It has accounts payable of $3,308,005, many of which have been outstanding for considerable periods. It is our expectation that prudent management would dictate that the cash flow represented by return on equity would, for the time being, be used in the company's financial recovery, rather than for the payment of dividends.

The return allowed will, we believe, restore the company's ability to finance new equipment purchases. Restoration of the company's ability to earn a profit, accompanied by a prudent program of cash management and reduction of current liabilities, should open up to the company sources of financing now closed. In addition, some portion of the return earned can be utilized for down payment purposes.

Looking at the future annual period alone, we cannot really say that the company will regain both the form and substance of financial strength and stability simply on the basis of the return we allow here. In recent years, the company has sustained repeated substantial losses which have weakened its general financial structure. No single determination of a proper level of return – such as we are making here – could restore the company's financial health *ipso facto*. That objective will be achieved by a record of sound operating results over a considerable period of time. However, we think the return allowed here will contribute to the company's recovery while not imposing an undue burden on the ratepaying public.

In most recent D. C. Transit cases, we have found that a dollar return on equity of about $750,000 to $800,000 would be adequate. The return we allow here

is somewhat higher than that.[10] We think that this fact is justified by a number of factors. First, we are here requiring renewal of the bus purchase program. In light of the company's recent financial history, we believe that a greater amount of internally generated capital will be needed to make those purchases possible. If the company can purchase the buses with 10% financing on an eight-year payout, it will require another $310,000 per year in principal payments, which is almost $100,000 greater than the funds to be generated by the allowance for depreciation. As noted above, p. 11, *supra*, we will require the company to sequester $620,000 needed for the down payment on the bus purchase. Thus, some $720,000 in cash, beyond that produced from fares, will be required of the company to effect the bus purchase. This fact provides further justification for the small increase in return on equity which we here allow.

Further, whether the company will resort to new borrowings or equity sources, an analysis of the company's balance sheet shows an urgent need to meet over three million dollars' worth of accounts payable and over two and a half million dollars' worth of principal repayments, not counting the one million dollar temporary loan to cover pension fund payments, which expires December 31, 1970. After deducting the funds to be generated by the charges for depreciation, there still remains a need for at least four million dollars in new funds. There is no question but that the service charge for this kind of refunding will run at least $400,000 per year.

We are not unaware that this company has been facing a downward trend in ridership since late 1966. While we have used the company's projected ridership figures, we consider that there is some possibility that further

[10] The impact of this additional amount on fares is minimal. The added $107,146 is only .26% of the total passenger revenues of

reductions in ridership, not anticipated in the company figures may take place. While not flatly predicting this result, it is a sufficient possibility and we have weighed it in considering that the return here indicated is not excessive.

In addition, we have required the company, in another section of this order, to prepare for the institution of a senior citizens reduced fare in off-peak hours. We regard this a highly desirable and important program. We believe it can be done without a substantial adverse impact upon the company's revenue picture. However, there is no guarantee that this is the case and we have this additional risk in mind in allowing a dollar return on equity at a slightly higher level than we have authorized in the past.

Turning to certain tests of return levels, we find that the return allowed provides a return on system rate base of 9.87%. The return on capitalization of Transit as of November 30, 1969, is 10.87%. Return on equity is 52.10%. This figure must be carefully assessed. The losses incurred by the company in recent years have reduced retained earnings from $2,890,848 in 1966 to $1,241,204 as of November 30, 1969. Were it not for special adjustments to retained earnings in the net amount of $605,008, during the past three years, the balance in retained earnings account would have stood at $636,196.

We believe that this factor must be heavily weighed in considering the significance of the percentage return on equity. In these circumstances, the percentage return is an unreliable indicator of adequacy. The central fact is that the dollar return which is our target has remained essentially the same for several years. Circumstances have prevented the company from earning that return, with a consequent effect on the level of retained earnings. We believe that the factors which made the dollar

level appropriate at a time when those dollars meant 38.54% return on equity are equally valid today. Thus, since we are allowing a dollar return on equity which is only slightly higher than the levels we have found to be reasonable in other recent orders, and since we think that there are sound reasons for that slight extra allowance in this proceeding, we do not regard the percentage return on equity which that dollar return now represents as being an obstacle to our allowance here.

For all those reasons, we conclude that a net operating income of $2,440,284 is just and reasonable for this company.

D. *Revenues and Expenses – Under Fares Proposed by Applicant*

We first consider the financial results projected under the company's proposed fare structure.

Before setting out the results, we should resolve a question concerning the resistance factor. This is the measure of the extent to which the increased price of bus transportation will cause some passengers to forego the use of buses.

In the present proceeding, the company suggested that a factor of .33% for the decrease in patronage for each 1% increase in fares be used. The company based its resistance factor on what it claimed was a conservative reading of a study of the decline in patronage between the thirteen week period directly following the last fare increase and the same period in the previous year.

The staff applied a resistance factor of .32% to its calculations. It also based its figure on a comparison of ridership levels before and after the most recent fare increase, but it chose as a test period the twelve weeks just prior to the submission of its evidence. We will accept the staff figure, as it is both more recent, and more

likely to be free of distortion caused by the fluctuations in ridership patterns which occur in the period immediately following a fare increase.

There is one further point to be resolved. Transit asked that recognition be given to the diminution in revenue during future periods if tokens, purchased for 32¢ are used for a 40¢ ride. Transit's witness estimated that there were over 1.3 million tokens outstanding at the end of the historical period, November 30, 1969. At eight cents each, this would affect future revenues by $104,000. In view of the fact that there will be an additional diminution due to outstanding commuter tickets for interstate rides, we will allow the company's adjustment in its Exhibit No. 4, Schedule No. 1, in the amount of $105,192. A similar adjustment was recognized by the Commission staff in the last D.C. Transit Rate case.

Using the .32% resistance factor, then, the company's proposed fares would produce the following results:

TABLE III

Projected Operating Statement For Future Annual Period At Fares Proposed By The Applicant

Operating Revenue	
Passenger	$41,597,524.00
Schoolfare Subsidy	2,548,136.00
Charter and Sightseeing	2,402,968.00
Government Contract	137,336.00
Other	273,964.00
Total Operating Revenue	46,959,928.00
Operating Revenue Deductions	
Operating Expenses	39,822,244.97
Taxes, Other Than Income Taxes	1,425,761.80
Depreciation	2,439,225.30
Acquisition Adjustment	(72,305.53)
Track Removal and Repaving	526,177.03
Additional Expense for Marketing Program	150,000.00
Income Taxes	83,024.06
Total Operating Revenue Deductions	44,374,127.63
Net Operating Income	$ 2,585,800.37
Operating Ratio	94.49%
Rate of Return on Operating Revenue	5.51%

We are unwilling to accept these projected results for two reasons. First, the return is somewhat higher than that which, in our judgment, is fair and reasonable. More important in this instance, however, we believe that the fare structure proposed by the company includes some increases which do not merit our approval. We will turn next to these rate structure problems.

III

THE APPROPRIATE RATE STRUCTURE

There are five problems concerning rate structure with which we must deal: First, the magnitude of the proposed increases in Maryland fares; second, the question

of the downtown minibus fare; third, senior citizen fares; fourth, the question of zone fares within the District of Columbia; fifth, the interrelationship between Maryland and District fare levels.

A. *The Proposed Maryland Fare Increases*

The company proposes a schedule of fares for Maryland which would raise the fares for Maryland local riders from 8¢ for riders in the first two zones to 78¢ for riders in the last zone. Similarly, interstate local passengers would pay increases ranging from 13¢ to 83¢ per rider; and interstate express riders would pay from 10¢ to 70¢ additional per ride. This magnitude of increase cannot be approved. While the proposed increase in the beginning zones is not unreasonable, the cumulative effect on riders' fares in the fourth zone and beyond for interstate passengers, and in the third zone and beyond for local Maryland riders, is intolerable. Pushing the fares upward to the levels proposed in the middle and outer zones of Maryland service would undoubtedly cause a drastic ridership decline and quite likely a reduction, rather than an increase in revenue. The lost riders would go to private cars, thus adding to the familiar cycle of higher fares required from the remaining riders for slower service caused by heavier automobile traffic. Moreover, no justification whatever has been put forward for the very large percentage increases sought to be imposed on the Maryland middle and outer zone rider.

We believe that a reasonable approach to the Maryland fare structure would be to increase the local Maryland fare from 32¢ to 40¢ for the first two zones so that it will remain comparable to the D.C. fare and to limit the increase in each of the other zones to 8¢ over what is paid today. Likewise, the interstate local fares will be raised 8¢, and express fares will be raised 10¢

B. *The Minibus*

The company has applied for an increase in fare on the Downtown Shopper Minibus from 10¢ to 20¢. The effect of this increase, as shown in Company Exhibit No. 4, Schedule No. 1, would be a reduction in ridership of approximately 280,000 coupled with an increase in revenues of approximately $28,000. Although the figures presented in staff Exhibit No. 1 differ slightly from these, they are similar in magnitude. These figures indicate that the proposed fare increase would cause one-third of the present minibus riders to cease to ride in order to provide a relatively small increase in revenue.

In Order No. 1030 (served March 24, 1970), we granted D.C. Transit's application to increase the headway on this service from three to four minutes. We stated in that order that the operation should be closely scrutinized for a period of six months to determine what further adjustments are required to insure a responsive service. Meanwhile, a doubling of the fare causing one-third of the passengers to stop using the service would undoubtedly bring about increased pressure for a further reduction in the service which, in turn, would cause a further reduction in patronage. This cycle would eventually lead to the complete destruction of the operation.

The minibus got its start in Washington with a 5¢ fare and very frequent service. Retail trade at downtown stores was to be stimulated because a person shopping at one end of downtown would be able to patronize stores at the other end with a minimum of time and cost involved.

The typical ride is of very short duration and the value of service provided is thus different than that which prevails on the company's regular route service. In addition, we believe that we should give consideration in weighing this fare to the role which the service plays in the overall economic health of the downtown area or, to

be more precise, to the impact of the destruction of that service on that health.

For these reasons, we will not take action to raise the minibus fare at this time. However, we think both the company and the business community of downtown Washington should recognize the need to seek innovative means to provide proper financial support for this service. We do not feel at this point that the general rider is being unduly burdened to support the minibus service. However, that judgment may not be valid indefinitely.

Since the minibus service is of a definite benefit to the downtown merchants in that it makes it easy for persons to get from store to store, and since the amount of revenues that D.C. Transit expects to realize from the proposed fare increase is only in the neighborhood of $28,000, it occurs to us that Downtown Progress might be willing to provide a subsidy in order to prevent the present operation from deteriorating and eventually disappearing. Certainly it seems logical to us that the merchants who are benefited by the service should provide financial support to the extent the minibus cannot support itself at a fare level which provides an inducement to ride. Furthermore, since the lower the fare, the more likely are people to use the minibus to travel to additional stores once they are downtown, it might prove to the advantage of Downtown Progress to provide an even larger subsidy in order to bring about the return of five-cent fares.

We will make available a copy of this Order to officials of Downtown Progress. We will expect the company to follow up the matter with them. In addition, if the staff of the Commission can be of assistance in exploring the possibility of an eventual subsidy by the merchants, their aid will be made available.

C. *Reduced Off-Peak Fares for Elderly*

In our recent rate orders involving the W. V. & M. Coach Company, and the W. M. A. Transit Company, we indicated that we will direct each of the area mass transit bus operators to develop an experimental program for the provision of reduced fares for senior citizens during non-rush hours. We do not view such a program necessarily as a financial imposition on the company inasmuch as it is our belief that a reduced off-peak fare could produce more revenue than is now produced during the off-peak period through greater ridership. At any rate, we believe the matter deserves to be tried. Many cities already have the reduced fare for the elderly, and there is, therefore, a wide range of possible fare schemes and experience that can be drawn upon. We will direct the company to submit, within 60 days, a plan for implementation of such a program for the elderly as we have described.

D. *Zone Fares Within The District*

There was discussion in this record, as in the last, about the feasibility of fare zones within the District of Columbia. There was, however, little dispute on the point. Company witnesses discussed in somewhat more detail the serious problems which such a proposal would raise. Their testimony was not seriously disputed by any other party. As in Order No. 984, we do not believe there is any basis in this record for requiring the institution of a zone fare system within the District of Columbia.

We should note, however, that this question which we are also examing in the proceedings on remand of Docket No. 131R pursuant to *Payne* v. *WMATC,* 415 F.2d 901 (D.C. Cir. 1968). The status of that proceeding is described in the next section of this order.

E. *Balance Between Maryland and D.C. Fares*

We are careful in each Transit rate case to consider the impact of the fares we authorize on the balance between Maryland and the District of Columbia. For several years, the Maryland and interstate service have provided about 15% of the company's passenger revenues, while D.C. fares have provided the balance. In *Payne* v. *WMATC, supra,* the court of appeals directed us to consider whether this balance between Maryland and D.C. fares was justified by cost allocation studies. Pursuant to the court directive, we engaged the services of an independent consultant to study the question. In November, 1969, the consultant filed its report on the subject, concluding generally that the Maryland and D.C. services of Transit each met their properly assigned costs. This study must be subjected to the scrutiny of the hearing process before we will accept it as valid. Steps toward the hearing have been initiated. The study was made available to all interested parties and a period of time for their review was provided. Thereupon, a series of pre-hearing conferences was held, at which issues were defined and procedures for the hearing were established. The next step is the issuance of a pre-hearing order embodying the agreements reached and disposing of the disputed questions. The extremely heavy press of other Commission business, including the processing of three rate cases simultaneously, has prevented us from issuing that order to date. However, it will be forthcoming in the very near future and the remand proceedings will then move to their conclusion. In the meantime, we feel that the consultant's study, although we do not accept it as final, provides an adequate basis to adjust fares once again, as was allowed by the court in the *Payne* decision. We feel, however, that the same general relationship between interstate, Maryland, and D.C. revenues should be maintained. We

have examined that question and find that the fares we authorize produce the following result:

TABLE IV

D.C. Transit System, Inc.
D.C./Maryland Revenues
Contributioin to Total Revenues

	Future Annual Period At Present Fares	%	Future Annual Period At Authorized Fares	%
Intra-D.C. (1)	$32,669,775	84.95	$37,704,633	85.71
Intra-Maryland ...	2,189,483	5.69	2,259,111	5.14
Interstate	3,597,675	9.36	4,027,111	9.15
Total (1)	$38,456,933	100.00%	$43,990,855	100.00%
(1) Includes School Fare Subsidy.....	$ 1,772,709	4.61%	$ 2,548,136	5.79%

The new schedule of fares wil have intra-D.C. riders (including the schoolfare subsidy) contributing 85.71% of total regular route revenue, intra-Maryland riders contributing 5.14%, and interstate riders contributing 9.15%, compared to the respective contributions by each segment of 84.95%, 5.69%, and 9.36%, if fares had remained unchanged. In no instance does the impact of the new fare schedule disturb the existing relationship between the major segments to the extent of as much as one percent.

We feel, therefore, that these fares meet the requisite standards in this regard.

With these questions resolved, we can turn to a description of the rate structure here authorized. We will raise the intra-District fare to 40 cents. The fares for Maryland local and interstate local service will also be

raised by eight cents. In order to maintain the differential relationship between fares for local and express service, the interstate express fare will be raised ten cents. The other increases authorized are: Capitol Hill Express, 5 cents (to 75 cents); D.C. Stadium, 25 cents (to $1.00), but 20-ride ticket available at $15.00 (75 cents per trip). The company has requested authority to sell tokens in quantities of five for $2.00. It is our opinion that purchases by the public should be permitted in quantities of four for $1.60, as this permits the passenger to purchase quantities good for an even number of round trips; the purchase of any amounts beyond four should also be permitted.

This fare structure will produce the following operating results:

Table V

Projected Operating Statement For Future Annual Period At Fares Authorized By The Commission

Operating Revenue	
Passenger	$41,442,719.00
Schoolfare Subsidy	2,548,136.00
Charter & Sightseeing	2,402,968.00
Government Contract	137,336.00
Other	273,964.00
Total Operating Revenue	$46,805,123.00
Operating Revenue Deductions	
Operating Expenses	$39,822,244.97
Taxes, other than Income Taxes	1,425,761.80
Depreciation	2,439,225.30
Acquisition Adjustment	(72,305.53)
Track Removal & Repaving	526,177.03
Additional Expense for Marketing Program	150,000.00
Income Taxes	73,735.76
Total Operating Revenue Deductions	$44,364,839.33
Net Operating Income	$ 2,440,283.67
Operating Ratio	94.79%
Rate of Return on Operating Revenue	5.21%

One item in the Table V projection requires further discussion. It involves a program requiring added operating expenses which Transit can afford to undertake at its authorized fares. We have repeatedly expressed our concern in recent years with the inadequacy of the company's marketing program. We believe that its efforts to maintain its existing ridership and to obtain new ridership have been impaired by its failure to promote adequately the use of its service.

We should make it clear that we mean by marketing a soundly conceived and well-carried out program of imparting information to riders and potential riders about the specifics of the company's service—its routes, its schedules, its terminal and stop locations, its transfer points and other items of similar information. We do *not* mean a program of "image-building" or "public relations" without substance.

We think that the public would benefit greatly from such a program. We are well aware that the company's financial condition in recent years has been such that it was not possible to undertake any significant improvement in this area. However, we think that with the fare structure here authorized, there will be funds available for this purpose. We think that the program, if it is to provide real benefits should be of significant magnitude. Hence, we feel that the company should spend at least $150,000 on new marketing efforts in the future annual period. To this end, we will require that amount to be earmarked and set aside in an escrow account to be spent only for those purposes.

We have in mind efforts of the following kind, among others: 1) Constant availability on each bus, timetables for the specific line on which the bus is then being operated; 2) Forms available on each bus which riders can mail in to obtain timetables for other lines; 3) Route map or maps which are substantially improved and are readily

available to riders again perhaps by mailing in a card available on each bus; 4) A program of signing at bus stops which makes available at that point route and schedule information; 5) Pamphlets listing current locations where tokens can be purchased; 6) The creation of information displays to be placed in public locations; 7) A substantial upgrading in the telephone information service so that all calls are promptly and efficiently handled. There are undoubtedly other types of marketing activity which would be helpful. To the maximum degree possible, they should be oriented to the dissemination of hard information about routes and services. We will allow the escrowed funds to be used to a limited degree to obtain the services of top quality qualified assistance in creating marketing programs.

The use of the funds for any given activity will be subject to our review and approval. The staff and company will be directed to work out procedures toward this end. We are firmly convinced that significant strides can be made in the marketing area and we will expect a first rate performance by the company in response to this directive.

For the reasons discussed above, we find these fares and these projected results to be just, reasonable and not unduly discriminatory.

We must discuss at this juncture the arguments presented to us that no increase whatever be authorized despite the financial facts we find.

IV

ALTERNATIVES TO FARE INCREASES

We face once again in this proceeding, as we did in the last D.C. Transit rate case, the contention that we should take no action to adjust fares despite the clear and urgent showing of financial need. Once again, the

District of Columbia Government, through its Deputy Mayor, appeared before us to urge that we take no action on fares because of the pendency of legislation permitting public takeover of the bus system. He was joined this time by representatives of the Amalgamated Transit Union, which represents Transit's workers, who urged upon us the same course of action.

We discussed the possibility of pursuing this course at considerable length in Order No. 984, our last D.C. Transit rate order. Much of that detailed discussion is applicable to the questions which have been raised here, and we herewith incorporate it by reference. See Order No. 984, pp. 24-32. Some further review of questions raised would be appropriate, however.

The Deputy Mayor, Mr. Watt, strongly opposed any further increases in fares until such time as the public takeover legislation is passed. We asked for his views on the very difficult question which this suggestion raises, i.e., what should we do about the prospect that our failure to act could lead to a cessation of service due to the company's deteriorating financial condition. However, in Mr. Watt's view this question need not be faced. He made it very clear that his position was based on the specific premise that there is a reasonable prospect for prompt enactment of that legislation by the Congress.[11] Unfortunately, this is not a premise which we are in a position to accept. We informed Mr. Watt at the hearing that the Chairman of the Commission had met with members of the House District Committee, which must pass upon the takeover legislation. It is the Commission's judgment, on the basis of the Chairman's discussions, that there is little, if any, chance that the House will act on public takeover at any time in the immediate future. Certainly chances of action in this session are

[11]At this juncture, the Senate has passed a bill but no action has been taken in the House.

almost non-existent. We are not even certain of a possible change beyond that period. Our assessment of the situation, as expressed at the hearings, was confirmed by press reports concerning subsequent contacts with key members of the House. Moreover, having informed District representatives as to our assessment of the situation, we urged them to demonstrate otherwise, if possible. No action has occurred in the House since that time.

Since we cannot accept the premise on which the District's position is based, we must face up to the consequences of our failure to adjust fares.

The union, in its presentation, frankly acknowledged what those consequences would be. The company would eventually be unable to continue operations. Further, the union urged us not to let that fact deter us from refusing a fare adjustment. Only such a threat, they urged, would produce action by Congress. We discussed this proposition at length in Order No. 984, at pp. 29-30. We will not repeat that discussion. Suffice it to say that we will not pursue the course suggested by the union for two reasons:

> (1) We do not have the legal right to do so. Both the Compact and the case law require us to provide sufficient revenues so that the company can cover its expenses and have an adequate return.
>
> (2) We think that subjecting the community to the reality, or even the substantial risk, of a cessation of service would not be in the public interest, even for a laudable goal of achieving legislation which would alleviate the problem of rising fares.

This is not to say that we are satisfied with the transit fare situation in which we find ourselves. We have repeatedly discussed, in our opinions, in Congressional

testimony, in City Council hearings, in public speeches, and in private discussions with members of Congress and others, the extremely undesirable effects of increasing transit fares. We have urged that action be taken to solve these problems. We have pointed out that the problem lies in the fact that transit, as a labor intensive business with little or no opportunity for increased productivity, faces constantly rising costs. Because economic, cultural, and social forces preclude a significant natural growth in ridership, these rising costs must be met by increased fares. The only alternative is to provide revenues from a source outside the farebox. We believe that a subsidy from public funds is an appropriate response to this problem. That possibility has, in the case of D.C. Transit, been tied to public ownership. We deplore the fact that no action has yet been taken concerning this serious problem, and the further fact that there is no reasonable prospect that action will be taken. However, we are left to live with the consequences of this inaction and we must exercise our judgment accordingly.

In this posture, we must face the economic realities, and the legal requirements, and the demands of the public interest. If they require an increase in fares, we must, and we will, grant it.

We should consider one further alternative—the possibility of cost reductions through service cutbacks.

There was considerable discussion in the record of the possibility of service reductions as an alternative to increases in fares. We have reviewed that evidence thoroughly and have concluded that this is not a viable alternative at this time. The magnitude of the reductions which would be required to overcome the company's increasing costs should first be understood. A one-cent increase in fares, at projected ridership levels, assuming

no fare resistance, would produce $1,125,000 in additional revenues. To reduce the revenues required by an equivalent amount by means of service cutbacks would require the elimination of 5% of the driver pay hours, i.e., about 236,000 driver pay hours. Thus, the record here shows a projected increase in labor costs in the future annual period of $3,415,000. If we were to conclude that, rather than meeting this increased cost with additional revenues produced through a fare increase, we should require reductions in service sufficient to avoid any increase in labor cost, it would be necessary to eliminate about 717,000 driver pay hours, or about 16% of the total.[12] This would mean tremendous reductions in service.

This fact, in turn, raises serious problems. First, the testimony of both staff and company is that the pattern of ridership loss is diffused throughout the system and is not concentrated by route or time of day, although night ridership has particularly suffered in recent years. Moreover, the fact that there is a heavy concentration of ridership during rush hours complicates the problem. Even though a significant percentage is lost in those periods, the remaining loads being carried are sufficiently high that significant cutbacks are not possible. Second, the spiralling effect of service cutbacks must be considered. A cutback of 16% might very well affect not only the costs but the revenues produced. As service becomes less frequent and less widespread, decisions may be made by riders to turn to other forms of transportation. This possibility was discussed by witness in this proceeding and is familiar to all of us from the history of railroads in this country.

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[12]These calculations are rough. They ignore the attendant reductions in cost of fuel, tires, etc. However, since labor costs are a very high percentage of total costs, these figures provide a picture of the order of magnitude of the cuts which would be necessary.

This is not to say that cutbacks in service have not been considered in the past and should not be further considered. Transit's Director of Traffic Research gave a detailed description of the company's procedures for ascertaining where cutbacks in service are justified and listed those cutbacks which have been made since December, 1968. It is apparent that this is a subject of continuing concern to the company and that procedures for adjusting service as needed do exist.

The Commission staff did suggest at the hearing that the company undertake special studies to determine whether further cuts are appropriate. They focused particular attention on night and Sunday service. They made clear, however, first, that they were recommending only that a study be made, without suggesting that significant reductions would, in fact, be possible. They recognized, for instance, that the requirements of the union contract that each man be given two consecutive days off limited the company's ability to achieve substantial cost reductions. They also recognized that the completion and implementation of such a study would consume significant time. Accordingly, they did not suggest it as an alternative to fare adjustments as a means of meeting the company's current financial needs. We agree with the staff's assessment that continuing studies of possible service reductions are both necessary and appropriate. We will expect the company to make such studies and make their results known to us.

In summary, therefore, we have heard testimony from both staff and company about the possibility of service reductions as an alternative to a fare increase. The evidence makes the following facts clear:

> (1) In light of the company's current financial condition, and projected revenue needs, only reductions of a very substantial nature could serve as an effective alternative to a fare increase.

(2) The pattern of loss in ridership does not offer any readily available opportunity for reductions of the magnitude which would be needed.

(3) The company has not been ignoring the effect of reductions in ridership and has been making reductions in service where it feels they are justified.

(4) Consideration of a major program of service cutbacks would raise many difficult and complex issues; much data would have to be collected and analyzed; the effects of various alternative schemes on both adequacy of service and revenues would have to be assessed; implementation of any changes decided upon would require significant time.

(5) Continuing studies of possible reductions in service are both necessary and appropriate. Such studies would have to consider not only identification of service which is not economically self-supporting but which cannot be justified in social and cultural terms.

In light of all these facts, we do not consider that we can avoid an increase in fares by requiring service reductions which would obviate the need for such an increase. We will, however, require continuing review and reports on the possibilities of significant service reductions.

V

SERVICE PROBLEMS

The staff testified that a cause of missed service is Transit's inability to maintain its full quota of drivers. It was recommended that the company be ordered to increase its quota of operators by ten, in order to ensure that a sufficient number would be available at all times.

We do believe that a problem exists in this area as runs continue to be cut due to lack of drivers. However, rather than direct Transit to hire a set increase in personnel at this time, we prefer to direct management to take all necessary steps to alleviate the problem forthwith. In the same way, we expect Transit to take the necessary steps to maintain its force of traffic checkers, another deficiency scored by the staff. We have provided, in this order, sufficient funds to allow Transit to solve the problems of personnel and equipment shortage, and having provided the wherewithal, we expect to see the intended result.

The staff has questioned the adequacy of the number of token outlets. Under an exact-fare system, such as we have in Washington, it seems to us important to the convenience of the riding public that token outlets be accessible and numerous. We are aware of the difficulty the company has had in maintaining outlets through banks and chain stores; these sources, which were once used, are apparently no longer available. The result is that whereas in September, 1968 there were 382 token outlets, as of March, 1970 there were only 111, and 68 of those were in government offices.

The staff recommendation was to estabilsh new token outlets at the terminals maintained by the company at 13th Street and Pennsylvania Avenue, Friendship Heights, Chevy Chase Circle and Mount Ranier. All but the 13th & Pennsylvania Avenue location have permanent terminal buildings which could easily house a token sales facility. We believe the staff suggestion has merit.

The staff also suggested that the company institute a stopover privilege whereby a bus patron could leave the bus at a company division office or terminal token sales outlet to buy tokens, then resume his bus journey without payment of additional fare. This is done successfully

by another area company and we believe it should be undertaken by D.C. Transit.

We will direct the company to report within 60 days a plan for providing token sales outlets at the terminals we have named, and to provide the stopover privileges at those and other company-maintained facilities.

The fares we establish by this order will become effective at 12:01 a.m., June 28, 1970. The company's current financial condition makes prompt institution of the new rates imperative.

FINDINGS OF FACT

We have stated our findings of fact on the issues in the proceeding in our discussion hereinbefore.

CONCLUSION OF LAW

The Commission concludes as a matter of law:

1. That the present fare structure of applicant is unjust and unreasonable in that it will not produce sufficient revenues in the future to enable the carrier to meet operating expenses and earn a reasonable return.
2. That the fare structure proposed by applicant would be unjust and unreasonable in that it would cause excessive disproportionate increases for multi-zone trips in Maryland.
3. The Commission under the applicable law, including the Compact, is required to prescribe a lawful fare whenever existing fares are found to be unjust and unreasonable.
4. That the fares authorized by this order are just and reasonable. They are not unduly preferential nor unduly discriminatory either between riders or sections of the Metropolitan District, and they are necessary to enable this carrier, under honest, eco-

nomical, and efficient management, to provide an adequate and efficient transportation service. They provide the means whereby this carrier may provide an adequate and efficient transportation service in the lowest cost consistent with the furnishing of such service, while affording it the opportunity of earning that return which we have found is necessary to make it an attractive investment to private investors.

THEREFORE, IT IS ORDERED:

1. That the fares proposed by D.C. Transit System, Inc., in tariff revisions filed March 13, 1970, be, and they are hereby, denied.

2. That D.C. Transit System, Inc. be, and it is hereby, authorized to file appropriate revisions to Tariffs No. 41 and No. 45 on or before June 26, 1970, to become effective at, or after, 12:01 A.M., June 28, 1970, setting forth fares shown in the Appendix attached hereto, and made a part hereof.

3. That all outstanding tokens and commutation tickets shall be honored as if purchased as the new rates prescribed prescribed herein.

4. That the requirement of Order No. 773 that D.C. Tranist System, Inc., annually purchase an average number of new air-conditioned buses equal to 1/14 of its fleet, which was suspended by Order No. 984, be and it is hereby, reinstated effective July 1, 1970.

5. That D.C. Transit System, Inc., make six monthly payments of $103,333, commencing in September 1970, into a special fund to be used for down payments for the purchase of new buses. Any monies in the fund not used for the express purpose described will be subject to disposition as directed by the Commission for the benefit of the riding public.

6. That applicant's account for Track Removal and Repaving Expense be charged the amount of $526,177.03 equally over the 12-month period beginning August, 1970, with a monthly contra-credit to the Reserve for Track Removal and Repaving of $43,848.08; that the monthly entries to these accounts per Order No. 984 be discontinued after July, 1970.

7. That the applicant place in a special fund $517,200, in monthly deposits of $43,100, beginning July, 1970, to be used for the purpose of financing the maintenance program described in this Order, page 10, *supra,* involving a night shift of twenty-one men. Expenditures from this fund will be authorized by the Executive Director of the Commission after the staff has received pertinent reports from Transit, and the staff is satisfied that the expenditures requested from the fund represent costs incremental to the pre-existing maintenance program of Transit. Any monies in the fund not used for the express purpose described, will be subject to disposition as directed by the Commission for the benefit of the riding public.

8. That applicant be authorized to charge to the Reserve for Injuries and Damages the sum of $1,900,000 per year, in equal monthly installments, beginning July, 1970; provided, however, that seventy percent of the amount of each monthly installment be placed in a special fund at or before the end of each month, expenditures therefrom to be limited to payment for judgments and claims for injuries and damages, exclusive of charges for administrative costs and legal fees chargeable against the Injuries and Damages Reserve.

9. That Transit immediately undertake a survey of senior citizen ridership patterns during off-peak hours to determine to what extent such persons presently ride during those times.

10. That within ninety days of the date of this Order, Transit shall file with the Commission a proposal for instituting a reduced, off-peak fare for senior citizens on an experimental basis, provided, however, that such plan need not be filed if Transit has not operated at a profit during that time.

11. That tokens are to be sold at the newly authorized rate beginning immediately upon the issuance of this Order.

12. That commutation tickets are to be sold at the newly authorized rates immediately upon the issuance of this Order, except for purchases made by mail and bearing a postmark as of the date of this Order or any date previous thereto.

13. That Transit submit a report on its plans to improve its marketing performance no later than thirty days after the issuance of this Order.

14. That Transit set up a special fund in the amount of $150,000, in equal monthly installments, beginning July, 1970, for the purpose of financing its marketing program as described in this Order, page 25, *supra*. Expenditures for this purpose from this fund may be made after receiving approval of the Commission. Any monies in the fund not used for the express purpose described will be subject to disposition as directed by the Commission for the benefit of the riding public.

15. That the staff of the Commission engage the services of a qualified consultant to determine the amount of deficiency, if any, in Transit's Reserve for Injuries and Damages, the cost of such study to be assessed against Transit.

16. That Transit report to the Commission, within sixty days from the date of this Order, a plan to provide token sales outlets at Transit terminals at Thirteenth and Pennsylvania Avenue, N.W., Friendship Heights, Chevy Chase Circle, and Mt. Rainier. Transit shall include in

this report provision for changing its tariff to permit stop-over privileges for patrons desiring to purchase tokens.

17. That any interest earned by funds set aside under the provisions of this Order shall be credited to Account No. 1214, "Other Operating Revenue."

18. That the Commission shall retain jurisdiction in this proceeding for the purpose of adjusting the special funds established herein as such adjustments may appear necessary in the future.

BY DIRECTION OF THE COMMISSION:

GEORGE A. AVERY
Chairman

DOUB, Vice Chairman, CONCURRING: Applications by D.C. Transit System, Inc., for fare increases have been before the Washington Metropolitan Area Transit Commission on three occasions since I became a member of the Commission in September, 1968. Prior to that date on behalf of the State of Maryland, I participated as People's Counsel, representing Maryland riders, in still another proceeding involving the fares of this company. In each of these proceedings the Commission, in the exercise of its judgment, based upon the individual case records, has found it necessary to grant this carrier fare increases.

Again, in this case, the Commission has authorized a fare increase. The constant pattern of decreasing riders and increasing expenses as evidenced in cases before the Commission presents a problem of grave concern to me (as I am sure it does to my colleagues on the Commission). Even a most casual review of the prior opin-

ions of this Commission indicates that the Commission is faced with what appears to be an unsolvable dilemma. The primary statutory responsibility of this Commission is to regulate the carriers in the public interest so as to insure adequate service at reasonable fares, while permitting the carrier to earn a fair return on its investment. In carrying out this mandate, the Commission has decided the various fare increase applications of this carrier within the limitations imposed upon the Commission by the Compact between the three jurisdictions entered into in 1961.

Again, in this case the Commission, in my judgment, has met its responsibility, albeit the public must now assume an even greater burden in insuring the financial stability of the carrier through increased fares and in turn its ability to render adequate public service.

In considering the evidence in this case, I gave great attention to the testimony of several protestants (notably the Deputy Mayor of Washington) who urged that this fare application be denied in its entirety. In substance, the protestants argued that the level of fares has already reached a point which imposes an intolerable burden upon the riding public. When faced with the choice between another round of fare increases or the prospect of an eventual insolvency proceeding, the argument was made by the intervenors, which I cannot discount lightly, that the long-range public interest may be better served by a denial of this application. If such a denial were possible under the law and would have the effect of providing an impetus to Congress to enact legislation for a prompt public takeover, it could well be a desirable action. This Commission has testified in favor of such legislation before the House and Senate District Committees on several occasions.

Unfortunately, under the terms of the Compact, the Commission has no choice but to award another fare

increase. Any other action would be an evasion of my responsibilities under the law. However, I do express again the need for legislation that will either permit lower fares through permanent public subsidy or public ownership. This would be the only real insurance against the prospect of any further increases by a continuation of "regulation by crisis."

I find little comfort in passing the Commission's order in this case. If there is any solace to be gained whatsoever, it is perhaps our direction to the Company to propose a schedule of reduced fares applicable to service for the elderly residents riding within the service area of the carrier. However, this action may be termed by some, and perhaps the Commission itself, as nothing more than making the best of a "bad" situation.

The Compact delineates clearly the latitude within which this Commission must decide such fare application proceedings. Our order meets fully this responsibility under the law. These comments express nothing more or less than my personal concern that because of a legal requirement we have provided at best another short-term period of relief at the expense of the riding public, many of whom should not be taxed as riders for the maintenance of an essential public service. Permanent relief must come from sources other than the fare box.

APPENDIX

PRESENT, PROPOSED AND AUTHORIZED FARES

Application No. 613

	Present Fares	Proposed Fares	Authorized Fares
District of Columbia			
Cash	$ .32	$ .40	$ .40
Token	.32(5/$1.60)	.40(5/$2.00)	.40*
Interline – To D.C. Transit	.27	.35	.35
From D.C. Transit	.32	.40	.40
Capitol Hill Express	.70(a)	.75(e)	.75(e)
Minibus	.10	.20	.10
School	.10	.10	.10
Transfer	Free	Free	Free
Maryland			
Zone 1	.32(b)	.40(f)	.40(f)
2	.32(b)	.40(f)	.40(f)
3	.47(b)	.55(f)	.55(f)
4	.52(b)	.70(f)	.60(f)
5	.57(b)	.85(f)	.65(f)
6	.62(b)	1.00(f)	.70(f)
7	.67(b)	1.15(f)	.75(f)
8	.72(b)	1.30(f)	.80(f)
9	.77(b)	1.45(f)	.85(f)
10	.82(b)	1.60(f)	.90(f)
D.C.-Md. Interstate Local			
Zone 1	.47(c)	.60(g)	.55(g)
2	.57(c)	.70(g)	.65(g)
3	.67(c)	.85(g)	.75(g)
4	.77(c)	1.00(g)	.85(g)
5	.82(c)	1.15(g)	.90(g)
6	.87(c)	1.30(g)	.95(g)
7	.92(c)	1.45(g)	1.00(g)
8	.97(c)	1.60(g)	1.05(g)
9	1.02(c)	1.75(g)	1.10(g)
10	1.07(c)	1.90(g)	1.15(g)

WMATC Order 1052

	Present Fares	Proposed Fares	Authorized Fares
D.C.–Md. Interstate Express			
D.C.–Md. Line	$ .50(c)	$ .60(g)	$ .60(g)
Zone 1	.60(c)	.70(g)	.70(g)
2	.70(c)	.80(g)	.80(g)
3	.80(c)	.95(g)	.90(g)
4	.90(c)	1.10(g)	1.00(g)
5	.95(c)	1.25(g)	1.05(g)
6	1.00(c)	1.40(g)	1.10(g)
7	1.05(c)	1.55(g)	1.15(g)
8	1.10(c)	1.70(g)	1.20(g)
9	1.15(c)	1.85(g)	1.25(g)
D.C. Stadium			
Cash	.75	1.00	1.00
20-ride ticket–$15.00	None	.75	.75
Virginia Interstate Zone	.10(d)	.15(d)	.15(d)

* Minimum purchase, four; purchases permitted in any quantity beyond four.
(a) Or valid transfer or token plus 38¢ cash
(b) Valid token has 32¢ value toward total cash fare
(c) Valid transfer or token has 32¢ value toward total cash fare
(d) Available only in addition to D.C.–Md. Interstate or Md. Intrastate fare
(e) Or valid transfer or token plus 35¢ cash
(f) Valid token has 40¢ value
(g) Valid transfer or token has 40¢ value

Note: Combination of tokens may be used for payment of fare.

Rehearing Order

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21865 **September Term, 1987**

Democratic Central Committee of the
District of Columbia, et. al.,
Petitioner

v.

The Washington Metropolitan Area
Transit Commission
Respondent

and consolidated cases

BEFORE: Robinson, Circuit Judge, and MacKinnon,
Senior Circuit Judge

ORDER

Upon consideration of the amended petition for rehearing of Intervenor, D.C. Transit System, Inc., and of the motion of the Black United Front for Leave to File a response to the amended petition, it is

ORDERED, by the court, that the motion for leave to file response is granted and it is

FURTHER ORDERED, by the court, that the amended petition is denied.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

Rehearing En Banc Order

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21865 **September Term, 1987**

Democratic Central Committee of the
District of Columbia, et. al.,
Petitioner

v.

The Washington Metropolitan Area
Transit Commission
Respondent

---

and consolidated cases

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of the amended petition for rehearing *en banc* of Intervenor, D.C. Transit System, Inc., and of the motion of the Black United Front for Leave to File a response thereto, it is

ORDERED, by the court *en banc*, that leave to file the response is granted and, no member of the court having requested the taking of a vote on the suggestion, it is

FURTHER ORDERED, by the court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

(3)

No. 88-979

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

D.C. TRANSIT SYSTEM, INC.

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, *et al.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

For Respondents, The Democratic Central Committee of the District of Columbia, Tilford E. Dudley, Bruce Terris, The Emergency Committee on the Transportation Crisis, Sammie A. Abbott, The Metropolitan Citizens Advisory Council, Thomas E. Payne, Lawrence Aaronson, Marion Barry, Jr., Linwood D. Chatman, Margaret M. Clarke, Matthew K. Clarke, Joseph Gipson, Lillian Green, Ralph Petie Green, Willie J. Hardy, Dorothy Harrison, Hubert W. Leckie, Lester McKinnie, Mrs. Robert Nash, Bernard W. Prior, Mary Ray, Frank Speltz, George E. Storey, Chauncey Thomas, William A. Wendt, Johnie Wilson, Clarence Wolrich, Maria Worris, and Mrs. Phillip Young.

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December 23, 1988

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No. 88-979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

D.C. TRANSIT SYSTEM, INC.

Petitioner,

v.

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Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

Petitioner's identification of the opinions below is incomplete and misleading. Omitted are two earlier opinions in this case, *Democratic Central Committee* v. *WMATC*, 158 U.S. App. D.C. 7, 485 F.2d 796 (1973), *cert. denied*, 415 U.S. 935 (1974) (*"DCC I"*), and *Democratic Central Committee* v. *WMATC*, 158 U.S. App. D.C. 107, 485 F.2d 886 (1973), *cert.*

denied, 415 U.S. 935 (1974) (*"DCC II"*). These cases are the prior merits decisions. The present case, *Democratic Central Committee* v. *WMATC*, 842 F.2d 402 (D.C. Cir. 1988) ("DCC III"), is the decision upon remand for the sole purpose of assessing damages pursuant to the rulings in *DCC I* and *DCC II*.

To cite and provide a fat appendix of detailed and largely irrelevant proceedings on remand of the two 1973 cases, *DCC I* and *DCC II*, without citing those cases is, at best, an incomplete compliance with Rule 21.1 (d). The same might also be said of the failure to include in the appendix two companion cases consolidated for argument below and extensively cross-referenced herein: *Bebchick* v. *WMATC*, 158 U.S. App. D.C. 79, 485 F.2d 858 (1973) (*"Bebchick II"*), and *Bebchick* v. *WMATC*, 207 U.S. App. D.C. 161, 645 F.2d 1086 (1981) (*"Bebchick III"*). But petitioner's violation of Rule 21.1(k)(ii) goes beyond that: petitioner reproduces in its appendix Transit Commission Orders 773 and 1052 without including the opinions in this case by the D.C. Circuit holding those orders illegal. Furthermore, petitioner sets forth orders 882, 900 and 984 without including the petitions for rehearing challenging them by reference to the then pending appeal from Order 773 which was eventually sustained in *DCC I*. These omitted applications are directly relevant to petitioner's first ground for granting the writ: that "rate orders issued between Order 773 and Order No. 1052 (i.e. Nos. 882, 900 and 984) were *never* challenged" (petition, p. 17, emphasis in the original).

Finally, it should be noticed that the slip opinion in *DCC III* reproduced in Transit's appendix is exceedingly inaccurate, having been amended several times after its issuance, as stated in the West reprint.

STATEMENT OF THE CASE

In the 1960's D.C. Transit completed its conversion from streetcar to buses. As a consequence, a good deal of real property formerly used in streetcar operations was obsoleted for that purpose and removed from public service. In 1967 rate hearings, the Democratic Central Committee of the District of

Columbia,[1] joined by a large number of community organizations and civic leaders, raised the issue of farepayer's entitlement to in-service appreciation of those real properties removed from operating status, the farepayers having previously borne the cost of conversion and the risk of a decline in value. Commission Order No. 773 of January 26, 1968 declined to give recognition to the public's interest in such "transferred properties," that is, "transferred" out of the owner corporation's regulated utility account into its private unregulated investment portfolio.

The farepayer's entitlement to in-service appreciation of property removed from operating status was raised not only in the 1967 proceedings leading to the January 1968 fare increase but also in all subsequent proceedings wherein rate increase orders were issued.[2]

[1] Now "The District of Columbia Democratic State Committee." To avoid confusion the former name is used throughout this brief.

[2] Orders 880 and 882 of October 18 and 29, 1968, were "interim" orders promulgated without "full and complete findings...that must accompany an exercise of...authority to prescribe permanent rates." Democratic Central Committee v. *WMATC*, No. 22, 450, 158 U.S. App. D.C. 68, 74, 485 F.2d 886, 892 (1973) quoting from Payne v. WMATC, 134 U.S. App. D.C. 321, 327, 415 F.2d 901, 907 (1968). The record and briefs in No. 22, 450, decided the same day as *DCC I* and *II*, show that these petitioners incorporated by reference their previous transferred properties arguments and objections to Order 773 in their objections to Orders 880 and 882. But the issues were not reached. Although both the Commission and the Court recognized that "it was probable that Transit's bus riders were entitled to refunds," 158 U.S. App. D.C. at 75, 485 F.2d at 893, the interim orders, recognized as based on incomplete hearings, were upheld in the emergent circumstances shown. Interim Orders 894, 895, 896, 900, 903, and 963 of December 13, 1968 through July 14, 1969, continuing with minor adjustment the same level of fares as Orders 880 and 882, were reviewed in Yohalem v. WMATC, 141 U.S. App. D.C. 17, 436 F.2d 171 (1970). There the suggestion was made that D.C. Transit "liquidate certain of its assets which were not used in connection with its Transit operations." 141 U.S. App. D.C. at 27, 436 F.2d at 181. Despite temporary stays in Black United Front and Democratic Central Committee v. WMATC, 141 U.S. App. D.C. 73, 436 F.2d 227 (1970), vacated, Democratic Central Committee v. WMATC, 141 U.S. App. D.C. 79, 436 F.2d. 233 (1970), the D.C. Circuit in the interim order cases cited generally sustained the Commission's power, under the emergency conditions shown, to award fare increases without awaiting determination of farepayer restitution issues. Postponement of such an adjudication was upheld even in the face of a receivership petition. Democratic Central Committee v. D.C. Transit System, Inc., 148 U.S. App. D.C. 154, 459 F.2d 1178 (1972). The transferred properties issue was again incorporated by reference in objections to Order No. 984 of October 24, 1969, but before an appeal could be perfected, new rates reviewed in *DCC II* went into effect and remained in effect until Transit ceased operations on January 14, 1973.

In 1969 the "transferred properties" issue was raised, in slightly variant form, upon remand of *Williams* v. *WMATC*, 134 U.S. App. D.C. 342, 415 F.2d 922, *cert. denied*, 393 U.S. 1081 (1969).*Cf. Bebchick* v. *Public Utilities Commission*, 115 U.S. App. D.C. 216, 318 F.2d 187 *(en banc), cert. denied.* 373 U.S. 913 (1963). The Commission was urged to consider as an offset to a $1,058,856 "depreciation deficiency" charged against the Riders' Fund the appreciation in value of six of Transit's real properties that had been removed from public service. The Commission declined in its 1969 Order 981, just as in its previous 1968 Order 773, to credit farepayers with appreciation of properties retired from service.

In 1970, the Democratic Central Committee and its allied community organizations and civic leaders again raised the "transferred properties" issue in Transit rate proceedings of that year which eventuated in Commission Order No. 1052 wherein the public was again denied credit for appreciation of D.C. Transit's retired properties.

These successive 1968, 1969, and 1970 Commission rulings against the farepayers' right to a credit for appreciation of removed properties were all timely appealed to the D.C. Circuit.

On June 28, 1973 the D.C. Circuit reversed all of the 1968, 1969, and 1970 transferred properties rulings and remanded the appealed cases thereon for further proceedings to determine the precise amount due farepayers: *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Commission*, No. 21, 865, 158 U.S. App. D.C. 7, 485 F.2d 786 (1973) *cert. denied*, 415 U.S. 935 (1974) (*"DCC I"*); *Bebchick* v. *Washington Metropolitan Area Transit Commission*, No. 23, 720, 158 U.S. App. D.C. 79, 485 F.2d 858 (1973) (*"Bebchick II"*); and *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Commission*, No. 24, 398, 158 U.S. App. D.C. 107, 485 F.2d 886 (1973), *cert. denied*, 415 U.S. 935 (1974) (*"DCC II"*).[3]

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[3] The "transferred properties" claims presented by the Black United Front in petition No. 24, 428 were dismissed by the D.C. Circuit for want of jurisdiction because BUF failed to raise the issue in proceedings before the Commission. *DCC II*, 158 U.S. App. D.C. at 116-117, 485 F.2d at 895-896, held that only DCC's petition, No. 24, 398, "preserved the point for judicial review." BUF nevertheless participated in the remand

This Court denied certiorari in the two *DCC* cases on February 19, 1974 (No. 73-971). After completion of remand proceedings before the Commission,[4] the D.C. Circuit first entered its review decision in the companion case of *Bebchick* v. *WMATC ("Bebchick III")* 207 U.S. App. D.C. 161, 645 F.2d 1086 (1981); *Bebchick* v. *WMATC ("Bebchick IV")* 256 U.S. App. D.C. 296, 805 F.2d. 396 (1986); and later in the present case, *Democratic Central Committee* v. *WMATC ("DCC III")*, 842 F.2d 402 (D.C. Cir. 1988). Petitions for rehearing and rehearing *en banc in DCC III* were denied September 14, 1988.

REASONS FOR DENYING THE WRIT

The present remand proceedings for the assessment of damages, *DCC III*, were used by Transit to reargue, in variant terms, the 1973 rulings against it in *DCC I* and *DCC II*. Thus a good deal of *DCC III* is devoted to explaining and elaborating upon the more fundamental propositions disposed of—and discussed at far greater length—in *DCC I* and *DCC II*.

Although Transit's present petition is clearly directed to *DCC III* only—even to the point of not citing *DCCI* and *DCC II* in its "Opinions Below" and omitting these decisions from its appendix—its "Reasons for Granting the Writ" are not concerned with any of *DCC III's* restitution methodology; instead the petition is devoted entirely to claimed constitutional issues arising out of the fundamental holdings in *DCC I* and *DCC II*: that the farepayers were entitled to the appreciated value of assets removed from public service in the course of converting D.C. Transit operations from streetcars to busses, the farepayers having borne the cost of such conversion and the risk of any decline in value. *DCC I*, 158 U.S. App. D.C. 29-43, 485 F.2d 808-822.

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and subsequent appellate proceedings on the properties issue. Order 773 was sustained apart from those issues remanded in *DCCI*, Powell v. WMATC, 158 U.S. App. D.C. 301, 485 F.2d 1080 (1973).

[4] Issues involving other than "transferred properties" were also remanded, but those issues are not involved in the instant petition nor were they involved in the 1973 petition, No. 73-971.

Thus, while Transit's present petition purports to seek review of *DCC III*, it raises issues peculiar to its predecessors, *DCC I* and *DCC II*. This is evident from a comparison of the present petition with D.C. Transit's 1973 petition.[5]

What these respondents said then is even truer now. Referring to the nine related cases consolidated for argument with *DCC I* and *DCC II*, the 1973 memorandum of the Democratic Central Committee opposing certiorari asked:[6]

> There is some question at the outset of the wisdom of undertaking a piecemeal review of this exquisitely involved complex of litigation, especially since so many of D.C. Transit's present complaints are rooted in a stormy and litigious regulatory history....
>
> The absence of any constitutional issue is amply demonstrated by Judge McKinnon's dissenting views in No. 21,865 upon which petitioner relies so heavily. The issue he takes with the majority is not that their treatment of land appreciation is unreasonable nor particularly novel considering the weight of precedent supporting the majority view and the lack of precedent for the distinction urged in the dissent.... His point is simply that "the policy of judicial deference to agency actions" required upholding the Commmission's order....
>
> Analysis of agency practice and extensive local history and precedent constitute the warp and woof of both the majority and dissenting opinions in these cases.

While the Court has power to review the whole case upon a second appeal, such as this, assessing damages,[7] it ordinarily

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[5] D.C. Transit System, Inc. v. Democratic Central Committee, *et al*, No. 73-971, Supreme Court, U.S., Transcripts of Records and File Copies of Briefs, 1973, Volume 180.

[6] *Ibid.*

[7] Panama R. Co. v. Napier Shipping Co., 166 U.S. 280, 283-284 (1897)

will not do so "in the absence of extraordinary circumstances."[8]

There is not the beginning of such a showing here. Petitioner has not even requested review of *DCC I* and *DCC II* except by indirection. The denial of certiorari in *DCC I* and *DCC II* in 1973 was followed by fifteen years of protracted, painfully detailed administrative and judicial proceedings for the assessment of damages. Petitioner's superficial slogans do not warrant reopening these complex, fact-intensive decisions.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Democratic Central Committee
of the District of Columbia, et al.

December 23, 1988

[8] Christianson v. Colt Industries, 486 U.S. , 108 S. Ct. , 100 L. Ed. 2d 811, 831 (1988). This case and the cases cited, Panama R. Co. v. Napier Shipping Co., *supra, n. 7,* and Messenger v. Anderson, 225 U.S. 436, 444, all involved the compelling necessity of resolving conflicts between courts of coordinate dignity.

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No. 88-978 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

D.C. TRANSIT SYSTEM, INC.,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, BLACK UNITED FRONT, *et al.*,

Respondents.

BRIEF OF RESPONDENTS, BLACK UNITED FRONT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1988

No. 88-978

D.C. TRANSIT SYSTEM, INC.,

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v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, BLACK UNITED FRONT, *et. al.*,

Respondents.

Brief Of Respondents, Black United Front In Opposition To Petition For Writ of Certiorari

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RESTATEMENT OF THE CASE

D.C. Transit System, Inc. (hereinafter "Transit"), as was its predecessor Capital Transit Company (hereinafter "Capital") was not so much a public utility as it was a real estate venture. *Democratic Central Committee* v. *Washington Metropolitan Area Transit Commission* (DCCI), 458 F.2d 786, 811-812, 814-817 (1973), *cert. denied*, 415 U.S. 935, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974); *Democratic Central Committee* v. *Washington Metropolitan Area Transit Commission*

(DCCII), 458 F.2d 886, 899 (1973), *cert. denied*, 415 U.S. 935 S.Ct. 1451, 39 L.Ed.2d 493 (1974).

The grant by Congress of a franchise to Transit was conditioned on the acquisition of Capital's assets and the conversion of a streetcar/bus system to an all bus system.

This requirement caused Transit to assume an undepreciated cost of tracks and streetcars of $5 Million and a cost of removal of streetcar tracks and repairing and regrading of streets of $10 Million. *The cost of both of these items was later paid by the farepayers. DCCI*, 458 F.2d at 813-814, 816, 842.

At the same time, predictably, millions of dollars worth of real estate automatically lost its usefulness to Transit and was transferred out of operating status ("below the line") at book value. *Id.* at 789, 842, *DCCII*, 458 F.2d at 897, 899.

Transit and its stockholders received the benefit of the "useless" real estate to the extent of the excess of market value over book value and knew it would receive such benefit when Transit and its assets were condemned.

The Washington Metropolitian Area Transit Commission (hereinafter "Commission") based its fare-setting primarily on gross operating revenues (the operating value method) commencing in 1960. *DCCI*, 458 F.2d at 815.

Although the Commission did also consider the undepreciated costs of tracks and streetcars and the cost of track removal in fixing fares *Id.* at 816, it did not consider the "income" from market value of the "useless" real estate. *Id.* at 790. The Court of Appeals held this ommission to be error.

ARGUMENT

(Reasons for Denying the Writ)

At the outset, it is clear that no substantial constitutional questions are presented and that the Petition for Certiorari involves only matters of local law interpretation with which the Supreme Court is not concerned. *Id.* at 800-822.

The absence of any constitutional issue is amply demonstrated by Judge McKinnon's dissenting views upon which petitioner relies so heavily. Judge McKinnon takes issue with the Majority and believes they are in error to uphold the Commission's Order and to grant equitable relief. In concert with what appears below, Judge McKinnon heavily relies on his equitable disagreements with the majority, all of which emphasize the absence of a constitutional issue.

> "The Court of Appeals' holding was based upon the particular and unique facts (cite omitted) of this case (cite omitted) and is not a general holding relating to other kinds of assets or to other utilites.
>
> Central to this case was the fact that Congress and Transit "knew . . . that a good part of these same properties would . . . no longer be needed for transportation purposes" (cite omitted) when the stockholders acquired the stock of Transit.
>
> And the Court of Appeals specifically did not deal with the "kind of situation. . . that would have existed had the properties been purchased outright by [the] investors." (cite omitted)
>
> What the Court of Appeals held was that in this particular and unique fact situation "that in pass-

> ing on Transit's application for higher fares, the Commission should have considered the appreciation in the value of certain of Transit's landholdings occurring while the lands were in service and prior to this transfer from operating to non-operating status." (cite omitted)

These are the first four paragraphs of Black United Front's ("BUF") argument to Transit's 1973 petition for certiorari to *DCCI*, 485 F.2d 786 (1973), *cert. denied* 415 U.S. 935 (1974). Transit also took petition for certiorari to *DCCII*, 485 F 2d 886 (1973), *cert. denied* 415 U.S. 935 (1974).

The issues raised in the petition for certiorari to both *DCCI* and *DCCII* are identical to the issues raised in the petition for certiorari to *DCCIII*.

These arguments are essentially that the Court has engaged in retroactive ratemaking and the property of Transit and its stockholders has been confiscated without due process.

First, certiorari was denied in 1974 at 415 U.S. 935 to all of the same issues as are raised in the current petition for certiorari to *DCCIII*.

Second, Judge Robinson in *DCCII*, 485 F.2d at 912-3, stated:

> "The Commission has made a most conscientious effort to set Transit's fares at the proper level, and its task has been a most difficult and complex one. But we cannot avoid concluding that, performing its burdensome function, the agency has throughout acted on the erroneous postulate that it was compelled-no matter to what level it must raise the fares, how substantial the fall in rider-

ship, and how financially sick Transit might be- to set the fares so that Transit could always earn a profit. To be sure, Transit was entitled to a reasonable opportunity to earn a fair return from its operations.(cite omitted) It was not, however, for the Commission to insure a return. Neither the Compact (cite omitted) nor the Franchise Act (cite omitted) authorized a guarantee, nor did due process require it (cite omitted) nor, as the cases make plain, was it the Commission's prerogative to afford it. (cite omitted) Though the Commission has also commented that it has considered the public interest in restraining the rise in fares, we are convinced that the incorrect postulate to which we have referred has initially infected the Commission's whole thinking and its ratemaking process. Order No. 1052, in particular, cannot be judged apart from that mistaken premise, which we judge to be at its core. For this reason, as well as for the others we discuss in this opinion, (cite omitted) that order cannot stand.

. . .

"Given these infirmities in Order No. 1052, we are faced with the question of the disposition mandated. Defective fare orders cannot be cured by retroactive ratemaking, (cite omitted) nor is the Commission in a position to promulgate any new fares for Transit in light of the recent public takeover of its transportation assets and operations. (cite omitted) Nevertheless, we cannot give legal effect to the invalid fares set in Order No. 1052 by allowing that order to stand. (cite omitted) As in *Democratic Central Committee*, decided today, as in its decisional forerunner, *Williams*

> *v. Washington Metropolitan Area Transit Commission*, (cite omitted) we find the appropriate avenue of relief here to be restitution." 485 F.2d 913.

The proceedings before the Commission, the Court of Appeals and the Supreme Court have always been the same. They are not ratemaking proceedings. As appears from the quotation above, the proceedings are equitable for a clear reason. By the time the Court of Appeals had decided *DCCI* and *DCCII*, Transit had been condemned.

The only issue placed before the Court by Transit, as affects its petition for certiorari, is to what extent the increase in value of real estate, both depreciable and non-depreciable, should have been taken into account in rate fixing and the extent to which bus riders should have received the benefit therefrom.

DCCIII reaffirmed both *DCCI* and *DCCII* and the conclusions that the Commission made at the direction of the Court of Appeals.

There are not any new issues of law in *DCCIII* that were not decided in both *DCCI* and *DCCII* - and these very same issues were raised in the 1973 certiorari petition and were denied by the U.S. Supreme Court. 415 U.S. 935 (1974).

The Court of Appeals held in 1973 in this particular and unique fact situation "that in passing on Transit's application for higher fares, the Commission should have considered the appreciation in the value of Transit's real estate holdings while the real estate was in service and prior to its transfer from operating to non-operating status." *DCCII*, 485 F.2d at 895.

The Court of Appeals decision, then (i.e. *DCCI* and *DCCII*) and now (*DCCIII*), was based on a set of facts entirely unique to Transit. The Court of Appeals decided that when acting upon Transit's several fare applications, the Commission should have considered the income generated by real estate appreciation which everyone knew was to be removed from use for streetcar service at the time the stockholders acquired Transit. These cases do not present Fifth Amendment questions since they do not involve all acquisitions of property by utilities, or even all utilities, but only the unique case of one unique acquisition of real property in the District of Columbia under unique circumstances and particular legislation.

And, more specifically as to the questions of retroactive ratemaking and depreciation of property in violation of the Fifth Amendment, the Court of Appeals in *DCCII*, 485 F.2d 886, *cert. denied*, 415 U.S. 935 (1974) has made the critical issue extremely clear. *This is not a ratemaking case.* D.C. Transit was out of business by 1973 and the questions decided by the Court of Appeals were equitable in nature.

Rule 17 of this Court requires, in addition to a Constitutional issue, (See above) either a disagreement between this circuit and another circuit deciding the same issue, or a conflicting opinion within the D.C. Circuit.

Neither of these situations exists.

CONCLUSION

For the reasons stated above, we respectfully pray that the Court deny the petition for Writ of Certiorari.

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